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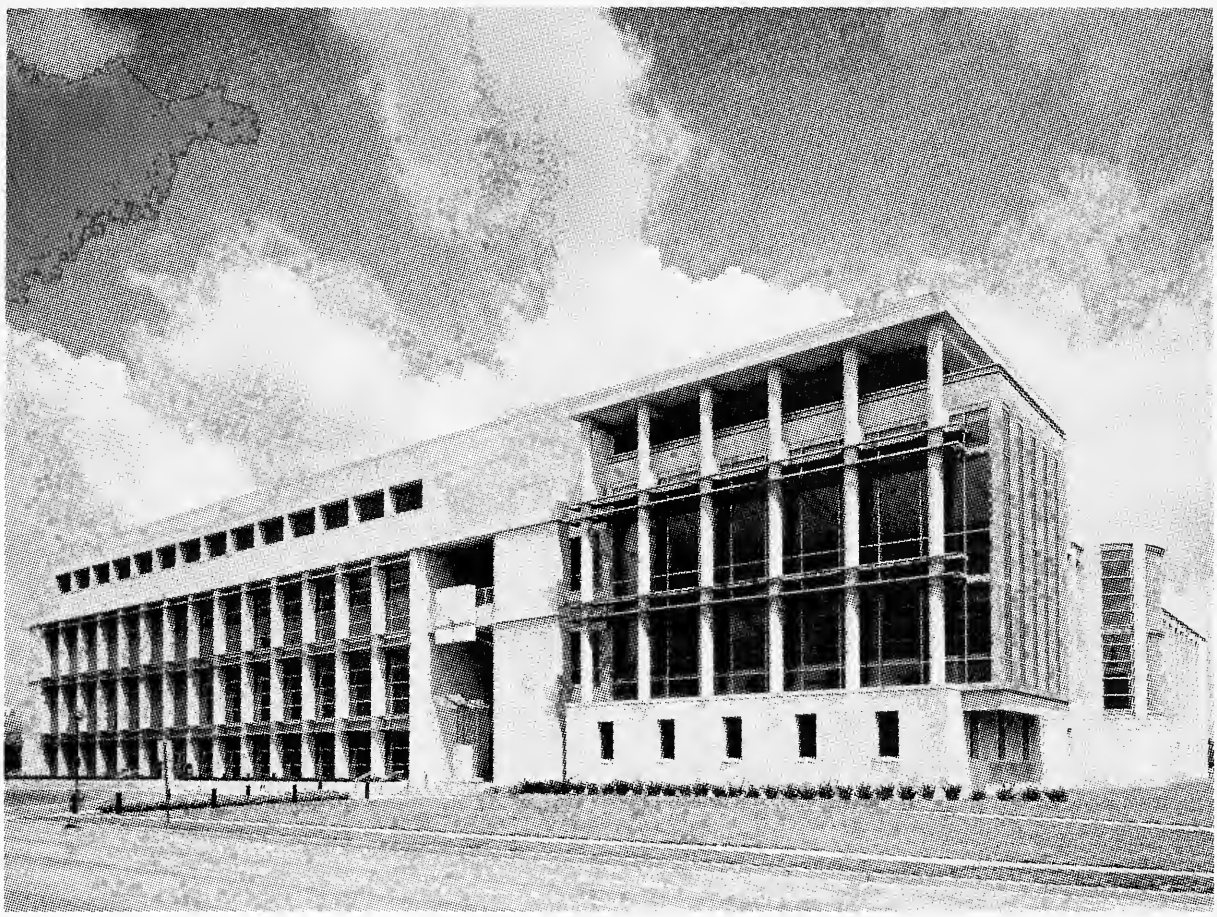

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The *Review* is published twice annually, with a periodic third issue devoted to a specific topic in international or comparative law. In 1994, in conjunction with the Italian Academy for Advanced Studies in America at Columbia University, the *Review* published a special issue on the political and social aspects of Italian law. In 1996, the *Review* published an issue addressing various aspects of Chinese law.

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Indiana Law Review Symposium

The Fair Housing Act After 40 Years: Continuing the Mission to Eliminate Housing Discrimination and Segregation

April 3-4, 2008

The *Indiana Law Review* is pleased to host a Symposium in celebration of the 40th anniversary of the passage of the Federal Fair Housing Act. The event will commence with a keynote address on the evening of April 3, 2008, by Theodore M. Shaw, Esq., Director-Counsel and President of the NAACP Legal Defense and Educational Fund, Inc. A reception will follow the keynote address. The *Indiana Law Review* anticipates that free tickets will be required to attend the keynote address.

The Symposium will be held on April 4, 2008, at the Indiana University School of Law - Indianapolis in the John and Barbara Wynne Courtroom. This date marks the passage of four decades since the tragic assassination of Dr. Martin Luther King, Jr. Dr. King's inspiring message of equal opportunity for every person and his commitment to changing views and attitudes are embodied in the Fair Housing Act. The Symposium will pay a special tribute to Dr. King and will honor his legacy through collaborative efforts to continue the eradication of housing discrimination and segregation.

CLE Certification (Pending Approval)

The *Indiana Law Review* is currently seeking CLE certification for this event and will post registration information for the Symposium as soon as it is available at http://www.indylaw.indiana.edu/ilr/symposium.htm.

The *Indiana Law Review* is honored to host this Symposium event and to publish a Symposium issue dedicated to a topic of such vital importance. For additional information regarding this event, including a list of guest speakers, please visit the Symposium website at http://www.indylaw.indiana.edu/ilr/symposium.htm or contact Elizabeth Ellis, Symposium Editor, at ilrevent@iupui.edu.

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THOMAS B. ALLINGTON

Indiana Law Review

Volume 41 **2008** **Number 1**

TRIBUTES

BIOGRAPHICAL TRIBUTE FOR PROFESSOR AND ASSOCIATE DEAN THOMAS B. ALLINGTON

GERALD L. BEPKO*

High quality academic programs are often based on the quiet strengths of faculty members who, consistent with their careful work as scholars, are not flamboyant. Instead, they are focused on the high achievement of each and every student, on the precise and scientifically grounded development of their fields, and on high impact—but often unheralded—service to society. Many of these extraordinarily important faculty will take on administrative roles during their careers, but they consider these to be diversions from the more important work of teaching and building knowledge.

A good exemplar of this model of faculty leadership is Professor Thomas B. Allington of the Indiana University School of Law—Indianapolis on the IUPUI campus. His teaching, research, and service over thirty-seven years on the faculty have produced high achievement among students, good knowledge development in his fields of tax and bankruptcy law, and important service to our University and its many constituencies. He has achieved all this both in his work as a member of the faculty and in two different periods of service as associate dean.[1]

Tom began law teaching at the University of South Dakota not long after earning his law degree from the University of Nebraska in 1966. He earned an LL.M. from New York University at about the same time he joined the faculty at Indiana University in 1970. In those early years, he was the quiet and unassuming leader of the significant number of new faculty who joined the School in the period of growth after the new building was opened. I know first hand of Tom's leadership because I was a new faculty member in 1972 and Jean Bepko and I became close friends of the Allingtons, owing in part to the fact that we lived near each other and our children were about the same age. He was the first of this wave of new faculty to achieve tenure and full rank and served as a role model as well as a voice for the younger faculty.

Tom taught the Law of Taxation for a number of years to large numbers of students and made regular contributions to the profession and the development of tax law. In the 1980s he brought another dimension to his portfolio. He began

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* Former Interim President of Indiana University; IUPUI Chancellor Emeritus, Indiana University Trustees Professor and Professor Law; former Dean of the Indiana University School of Law—Indianapolis.

1. Professor and Associate Dean Allington served as Associate Dean for Academic Affairs from 1990 to 1997 and Associate Dean for Technology from 1999 to 2007.

to teach the law of debtors and creditors, the most important aspect of which is the Federal Bankruptcy Law. This combination of taxation and bankruptcy, along with his knowledge of the law and practices of agriculture from his days in Nebraska and South Dakota, have given him a unique and valuable perspective, which has been of great value to students and to the profession for which Tom speaks and writes with some regularity.

This breadth paid special dividends for his students, which I observed firsthand when he taught a class session in my course on Secured Transactions. When I became campus Chancellor, I made a decision to stretch myself to continue to teach, but I didn't have enough time to feel good about some special areas that were evolving and required extra preparation. To address this, in the fall term 1988 I invited Tom to teach the class session in which the assigned topics included the role of the Federal Government as creditor, tax liens, and their relationship to security interests in personal property. The next day I wrote to then dean Norman Lefstein to tell him of Tom's masterful handling of my class. I said

> Last night he taught the first hour of my two hour session and covered the subject matter in admirable fashion. This is not an exciting subject to most students, but he held their attention and provided some stimulating perspectives, as you would expect a first-rate senior faculty member to do. . . . At the conclusion of his remarks, the students gave him warm applause. This seemed an unusual tribute coming from a group of students studying Secured Transactions from 5:30 to 7:30 each Wednesday evening.

As a further reflection of the breadth of Tom's contributions, he continues to serve on the American Bar Association Section on Taxation where he is a member of the Bankruptcy and Workouts Committee and former Chair of the Agriculture Committee. He also is an elected member of the American Law Institute and the American College of Tax Counsel.

In 1990, Dean Lefstein recruited Tom to be Associate Dean for Academic Affairs in the Law School—a position in which Tom could build on his natural leadership role among faculty and his meticulous focus on the quality of teaching and research. He contributed in excellent fashion in this role until his return to the faculty in 1997. Proof of his value in the dean's office is that he was recruited in 1999 to be Associate Dean for Technology, a position in which he was the faculty's champion for technology development and in which he gave voice to his own long-held interest in information technology.

Tom's role in the Law School has had a profound impact. As a teacher, scholar, servant of the profession and the larger community, contributor to the reform of the law, leader among faculty, dean for academic affairs, and dean for technology, Tom has been one of those extraordinary faculty who quietly provide the strength that makes academic programs great. Some may think that his modesty and his unassuming manner may mask or deemphasize the extraordinary contributions he has made. I doubt that this is true because his colleagues understand fully how valuable he has been to the School over the years. Even if there are a few who may not have known about his contributions because of his

disinclination to boast, this is more than made up for by Tom's inculcating in the culture of the School the modesty, integrity, and steadfastness that made him such an excellent member of the Law School community.

One faculty colleague, Professor Mary Mitchell, offered her own special perspective on Tom's work among faculty members in a memo to the Law School community. Her words convey these thoughts better than I could write them, and I am proud to include here a quote from her memo:

> Tom is unusually perceptive as to faculty dynamics, the deep currents in what is going on at a meeting or behind the scenes. He is unusually forthright, going straight to the relevant points in discussion, cutting through politics and posturing, verbiage and confusion. Many, many times Tom has been the direct and honest voice in a debate. His perspective is often fresh, sidestepping entrenched opposing positions with a creative alternative. His integrity is without question, his clarity useful time and time again. Furthermore—and this is a 14-carat virtue—when he disagrees with others, or even criticizes, he does so without personal attack or rancor, without polarizing debate, without self-aggrandizement, and often with disarming wit. For years I have watched him work a leavening of honor and good will into law school proceedings. While we cannot replace Tom's particularly winning style of collegiality and leadership, I hope that we are up to the challenge of following his example.

Tom has left an indelible positive imprint on the culture of the School for which all his faculty colleagues, students, and alumni should be grateful. After thirty-five years of frequent contacts, I know I have been affected by his work and friendship in a very positive way, and I will continue to be proud to be his colleague and friend.

A COLLEAGUE'S TRIBUTE TO THOMAS B. ALLINGTON PROFESSOR OF LAW AND ASSOCIATE DEAN FOR TECHNOLOGY

LAWRENCE A. JEGEN, III*

I have known Tom Allington for over thirty-seven years, beginning when he joined the faculty at Indiana University School of Law—Indianapolis in September 1970. We spent many of those early years together in a three-room office suite with Tom in one room, me in another, and our assistant in the room between us. Because Tom and I each produced significant amounts of teaching materials, it was often a race between Tom and me on Monday mornings to have our assistant type Tom's or my teaching materials first so that the materials could promptly be distributed to our students for that week's classes. If you have ever had a similar production problem, you know how easy it can be for one, two, or three tempers to flare on such Monday mornings. However, despite all of the potential temper-flaring situations which law professors encounter from time to time, never did my or Tom's temper flare about these matters or about any other. In fact, after the many years of our academic (and somewhat competitive) partnership, I believe that no one has ever had a finer academic roommate than I did. Further, the hard work that Tom put into his teaching during these early years molded Tom into a superb teacher of law who is loved by the students whom he taught and guided for over thirty-seven years.

Fortunately, Tom's accomplishments and contributions to the Law School did not stop with being such a fine roommate and teacher; Tom also became a superb administrator at the Law School.[1] His treatment of, help of, and respect for his students, colleagues, and assistants and his selfless dedication to doing well with respect to any job which was assigned to him by other Law School administrators or by committee chairpersons, has won him praise from all of his colleagues. At one time or the other, Tom chaired every Law School committee, frequently for more than one year each time. He particularly received praise when he chaired the Promotions and Tenure Committee and when he chaired the Curriculum Committee, which are the most important and demanding committees of the Law School. There are not many individuals who can sit in a room with ten to twenty very proud, aggressive, outspoken, and very articulate law professors, present to them some fairly radical changes to a system with which they had been happy and accustomed to for many years, and motivate them to update and change that system. Tom had the unique skill to recognize and incorporate the best of his colleagues' ideas and suggestions into the framework which Tom had worked so hard to develop and bring to the table.

Despite Tom's significant successes in teaching and normal law school administration, Tom's first administrative love has to be his responsibilities for

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1. Professor and Associate Dean Allington served as Associate Dean for Academic Affairs from 1990 to 1997 and Associate Dean for Technology from 1999 to 2007.

keeping the Law School technologically up to date. There is no doubt when the construction of the current law school building was complete and we all began to perform our services therein, the new building was equipped with outstanding electronic equipment which was available to all students, administrators, teachers, and assistants. Much of this success was due to Tom's research, planning, selection, and attention to the installation of and the continuing care of such fine electronic equipment. Tom is leaving the Law School a much finer place than it was when he came to it. Tom has placed his very personal academic and administrative mark on our law building, Law School, students, and faculty. That mark will remain there for many years to benefit thousands of future law students, professors, administrators, and assistants. One cannot ask for a more successful academic and administrative career than the one which Tom is completing, and I am happy that I have known Tom as colleague and friend for all of those years.

THOMAS B. ALLINGTON

NORMAN LEFSTEIN*

Chancellor Emeritus Jerry Bepko has written a marvelous tribute to Professor Allington, capturing Tom's numerous and varied talents that have made him one of the Law School's exceptional faculty members for more than three decades. Jerry Bepko's friendship with Tom dates back to 1972; whereas, I became acquainted with him when I came to the Indiana University School of Law—Indianapolis as its dean in 1988.

Shortly after my arrival, I needed to recruit a new Associate Dean for Academic Affairs, which is the second most important administrative position in the Law School and probably the most difficult because it requires constant faculty interaction dealing with course assignments and scheduling. To determine which of my new colleagues would be acceptable to the faculty as dean for academic affairs, I decided to meet with every faculty member individually. These meetings made my decision easy because I learned that the entire faculty had the highest respect for Tom. Not only were there no faculty members opposed to Tom's appointment, but all enthusiastically endorsed Tom for the position.

From 1990 to 1997, Tom served as the Law School's Associate Dean for Academic Affairs and repeatedly demonstrated the reasons why he was the faculty's choice. Tom dealt with his colleagues in excellent fashion, successfully negotiating countless teaching arrangements with faculty and adjunct instructors, as well as contributing important ideas leading to curricular improvements and progress in a host of other law school areas. Moreover, upon working with Tom, I learned immediately that he could always be counted on for wise, soft-spoken, and dispassionate counsel. In short order, he became my most trusted confidant respecting all matters related to law school administration.

Soon after Tom stepped down from his position as Associate Dean for Academic Affairs, I decided that there was another very important role in which Tom could contribute to the Law School's progress. To be a first-rate law school, we needed a person to spearhead our progress in technology, overseeing the development of the School's website, equipment purchases, and computer services for students, among many others. While it was clear to me that Tom would be the best person for the job because his knowledge and expertise in all matters related to technology were outstanding, I was unsure whether he would be willing to return so soon to law school administration. Fortunately, in 1999 he accepted my offer to become the Law School's first Associate Dean for Technology, and he continued to serve in that capacity until his retirement.

The Law School's new home—Lawrence W. Inlow Hall—is one of the most technologically advanced law schools in the country. This is due in no small measure to Tom's thoughtful contributions throughout the design and planning of our new facility. Tom served as a member of the Law School's Building

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* Professor of Law and Dean Emeritus, Indiana University School of Law—Indianapolis. LL.B., 1961, University of Illinois College of Law; LL.M., 1964, Georgetown University Law Center.

Committee and worked closely with the School's architects in the design of all of Inlow Hall's technological wonders.

Tom continuously displayed generous spirit and commitment to the Law School; even after his retirement as Associate Dean for Academic Affairs, Tom served on several occasions as chair of the Law School's Promotions and Tenure Committee. The effective chairmanship of this committee is vital to the operation of the Law School, but it is also a thankless, time-consuming job requiring considerable skill and patience. Because Tom possesses these attributes in abundance, he performed the job very effectively and once again earned the admiration of his faculty colleagues.

To be truly successful, all institutions require dedicated and talented persons like Tom Allington. The Indiana University School of Law—Indianapolis has been fortunate to have had Tom's services for many, many years. He will be missed and by no means easily replaced, but Tom Allington can bask in the knowledge of having served his Law School and Indiana University with great distinction.

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ARTICLES

RECENT DEFENSES OF CONSIDERATION: COMMODIFICATION AND COLLABORATION

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* Professor, Tulane Law School; Visiting Professor, University of South Carolina School of Law (Spring 2007). I thank Lloyd Bonfield, Nathan Crystal, James Gordley, Julie Jackson, Phil Lacy, and Brooke Overby for helpful comments on an earlier draft of this Article. I am also grateful to the participants who attended a colloquium at the University of South Carolina School of Law in October 2006. Finally, I thank Dean Larry Ponoroff of Tulane Law School for research support.

INTRODUCTION

Occasionally, the disputes of contract theory begin to appear very old, and each succeeding wave of scholarship seems to be little more than dressing up old ideas in new disguises and rehashing old disputes in new jargon. One cure for this academic variety of *Weltschmerz* is to encounter and address truly novel arguments about thoroughly familiar issues. In this Article, I wish to respond to two such novel efforts, the first by one of our most eminent and prolific contracts scholars, Melvin Aron Eisenberg,[1] and the second by a relatively more recent arrival, Daniel Markovits.[2]

The subject of the innovations introduced by Professors Eisenberg and Markovits is the so-called "requirement" of consideration, although in each case the treatment of the doctrine of consideration is part of a larger project. My own interest in the subject goes back to a study of over 300 consideration cases I published as a pair of articles in the 1990s.[3] I argued that, while the majority of applications of the doctrine of consideration are redundant, the doctrine nevertheless still has more than rhetorical bite, i.e., it still is outcome-determinative in a range of cases.[4] I further argued that contract law, on the whole, would be better off without it.[5] On the positive side, I argued that the reasons commonly advanced in favor of enforcing bargain promises—the facilitation of exchange, the protection of expectations or reliance, or respect for autonomy—could also be mustered in support of the enforcement of promises traditionally classified as gratuitous.[6] On the negative side, I argued that the reasons traditionally advanced for the claim that gratuitous promises are somehow suspicious and unworthy of enforcement were all inadequate.[7] In so

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1. Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CAL. L. REV. 821 (1997) [hereinafter Eisenberg, *Contract and Gift*].

2. Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004).

3. Mark B. Wessman, *Should We Fire the Gatekeeper? An Examination of the Doctrine of Consideration*, 48 U. MIAMI L. REV. 45 (1993) [hereinafter Wessman, *Gatekeeper I*]; Mark B. Wessman, *Retraining the Gatekeeper: Further Reflections on the Doctrine of Consideration*, 29 LOY. L.A. L. REV. 713 (1996) [hereinafter Wessman, *Gatekeeper II*].

4. Wessman, *Gatekeeper I*, *supra* note 3, at 52-114; Wessman, *Gatekeeper II*, *supra* note 3, at 717-817.

5. Wessman, *Gatekeeper I*, *supra* note 3, at 116-17; Wessman, *Gatekeeper II*, *supra* note 3, at 816-45.

6. Wessman, *Gatekeeper II*, *supra* note 3, at 817-25.

7. *Id.* at 826-44. The reasons for withholding enforcement that I examined, and ultimately rejected, included (a) the claim that "gratuitous promises are too trivial to merit enforcement"; (b)

arguing, I endeavored to examine all the *traditional* arguments in favor of and against the requirement of consideration, most of which had been made by multiple authors over a period of decades.[8] Each contribution to the discussion of the issues in question moved the argument to a new stage, but the issues themselves have been contested among scholars for a long time. Accordingly, though I continue to adhere to the views expressed in the earlier articles, I do not propose to revisit them here. Instead, I wish to focus on two quite innovative, albeit partial, defenses of the requirement of consideration.

As it turns out, the set of arguments that can be mustered on either side of contentious issues is never really closed. In an article published in 1997, Professor Eisenberg introduced an argument with no prior analogue of which I am aware. Specifically, he argued that at least one class of gratuitous promises—simple, affective donative promises—should remain unenforceable, as the doctrine of consideration dictates.[9] One reason is that a regime of enforcement would "commodify" donative promises and thereby impoverish what he calls the "world of gift."[10] Another is that a regime of enforceability could not, in principle, accommodate the full range of moral excuses for breaking such promises.[11]

More recently, Professor Markovits has suggested that the traditional requirement of consideration finds some support in a philosophical concept he calls "collaboration."[12] That concept is the most important element in a Kantian reconstruction and justification of the making and keeping of contracts,[13] a reconstruction that draws on more general Kantian foundations to account for both the moral obligation to keep promises and the legal obligations surrounding them.[14] The notion of "collaboration" upon which he elaborates is a technical one, and it has no antecedent of which I am aware in previous debates on the doctrine of consideration.

Ultimately, in my view, neither Professor Eisenberg's argument on the basis of "commodification" nor Professor Markovits's argument on the basis of "collaboration" provides a satisfactory defense of the traditional requirement of consideration. My response to their arguments will proceed as follows. In Part I, I examine and respond to Professor Eisenberg's views. After an initial and

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the claim that gratuitous promises are too likely to be "impulsive or imprudent"; (c) the claim that gratuitous promises are "too easily fabricated"; (d) the claim that enforcement of gratuitous promises would result in excessive "inadvertent contracting"; (e) the claim that gratuitous promises are subject to a "range of excuses" not easily captured by our legal system; and (f) the claim that enforcement of gratuitous promises would cause "unpredictable strains" and undesirable consequences elsewhere in our system of law. *Id.*

8. *Id.* at 817-44.
9. Eisenberg, *Contract and Gift*, *supra* note 1, *passim.*
10. *Id.* at 823, 847-49.
11. *Id.* at 823, 828-29, 831 n.32, 849-50.
12. Markovits, *supra* note 2, at 1474-91.
13. *Id.* at 1446-74.
14. *Id.* at 1422-46.

more detailed summary of his argument,[15] I proceed to a more articulated analysis of the concept of commodification on which it depends.[16] I examine several possible meanings of the term "commodification" and several corresponding versions of the claim that enforcement of donative promises would commodify them.[17] I argue that none of them provides the defense of the requirement of consideration to which Professor Eisenberg aspires.[18] I then examine, and ultimately reject, two possible interpretations of his claim that a system which enforced donative promises could not successfully accommodate the range of moral excuses to which such promises are subject.[19]

In Part II, I turn to Professor Markovits's argument based on the concept of collaboration. It is necessary to begin with a rather extended summary of his argument,[20] as it is both innovative and complex. After articulating the moral ideals of respectful community and collaboration that Professor Markovits uses as the basis of promise and contract, respectively,[21] I summarize his argument that the collaborative ideal supports the requirement of consideration in the law of contract.[22] My criticism of that argument proceeds in the following stages. Initially, I observe that, even if one accepts the value of the collaborative ideal, it provides, at best, an argument in favor of granting enforcement to bargain promises, but not an argument for withholding it from donative promises.[23] To the extent Professor Markovits presents a distinct argument for withholding legal sanctions from donative promises, it appears to rely on a claim that the presence of a "passive promisee" destroys the prospect for collaboration.[24] I then dissect his notion of a passive promisee and argue that it is too weak to support that claim[25] and can only be strengthened by maneuvers that ultimately make his argument question-begging.[26] Finally, I argue that, from materials found in Professor Markovits's own theory, one can construct an argument that moral ideals other than collaboration, but at least as valuable, support the enforcement of donative promises at least as well as the notion of collaboration supports the enforcement of bargain promises.[27]

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15. *See infra* Part I.A.
16. *See infra* Part I.B.1.
17. *See infra* Parts I.B.2.a-e.
18. *See infra* Parts I.B.2.a-e.
19. *See infra* Part I.B.3.
20. *See infra* Part II.A.
21. *See infra* Parts II.A.2-3.
22. *See infra* Part II.A.4.
23. *See infra* Part II.B.1.
24. *See infra* Part II.B.2.
25. *See infra* Part II.B.2.
26. *See infra* Part II.B.3.
27. *See infra* Part II.B.4.

I. PROFESSOR EISENBERG ON COMMODIFICATION

A. Professor Eisenberg's Argument

Initially, Professor Eisenberg distinguishes very carefully between the aspects of the classical doctrine of consideration[28] that he wishes to defend and those he does not.[29] In particular, he draws a definitional line between gratuitous promises and donative promises, with the latter being a subset of the former.[30] He uses the term "gratuitous promise" to refer to any "nonreciprocal or apparently nonreciprocal" promise, and the term would thus seem to encompass any promise that did not meet the classical requirement of bargained exchange.[31] Gratuitous promises thus encompass some promises, including uncompensated promises to hold an offer open for a fixed period of time or one-sided contractual modifications, that lie in the "hard-headed world of contract," in the sense that they are ancillary or related to bargains.[32] These sorts of promises violate the classical doctrine of consideration and were traditionally unenforceable, but Professor Eisenberg has consistently recognized the propriety of enforcing them.[33]

A "donative promise," on the other hand, is a promise to make a gift.[34] A "gift," in turn, is defined as "a voluntary transfer that is made, or at least purports to be made, for affective reasons like love, affection, friendship, comradeship, or gratitude, or to satisfy moral duties or aspirations like benevolence or generosity, and which is not expressly conditioned on a reciprocal exchange."[35] The paradigm cases of donative promises would thus seem to fall into two categories: (1) gift promises between family members, friends, or other close associates; and

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28. Generally speaking, the requirement of consideration may be formulated as the rule that a promise is not enforceable unless it is a component of a bargain. A transaction is a bargain, in turn, if and only if it is an exchange of promises or performances and each side of the exchange is the inducement for the other. Wessman, *Gatekeeper I*, *supra* note 3, at 49; Wessman, *Gatekeeper II*, *supra* note 3, at 804. However, it is generally recognized that the so called "doctrine" of consideration is actually not one rule, but a set of rules. The set includes the general requirement of bargained exchange, as well its purported corollaries, the pre-existing duty rule, the rule that illusory promises cannot be consideration, the requirement of mutuality of obligation, the rules that past consideration and moral consideration are insufficient, the full revocability of offers other than paid options, and a few special rules relating to covenants not to compete and employment not terminable at will. Wessman, *Gatekeeper I*, *supra* note 3, at 49-50; Wessman, *Gatekeeper II*, *supra* note 3, at 713-14.

29. Eisenberg, *Contract and Gift*, *supra* note 1, at 824-25.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* at 832-23; Melvin Aron Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 653-56 (1982) [hereinafter Eisenberg, *Principles*].

34. Eisenberg, *Contract and Gift*, *supra* note 1, at 825.

35. *Id.* at 823.

(2) charitable (and perhaps political) pledges.[36] Collectively, gift promises and actual gifts constitute the "world of gift," which Professor Eisenberg distinguishes from the "world of contract."[37] The latter term is confined to commercial agreements, and so includes most conventional bargains as well as those nonreciprocal business promises ancillary to bargains that do not qualify as gift promises.[38]

There are two further limitations on the territory Professor Eisenberg wishes to defend. First, he recognizes that a donative promise (in his sense) may be enforceable on a theory of promissory estoppel because of the promisee's justifiable reliance.[39] He therefore coins the term "simple donative promise" to refer to any donative promise, the enforcement of which cannot be justified by appeal to reliance or some other previously recognized substitute for consideration,[40] and confines his thesis to the claim that *simple* donative promises are, and should be, unenforceable.[41]

Second, though it is not as obvious at first glance, he appears to exclude charitable subscriptions from the scope of his thesis. He seems to approve of the rule recommended in section 90(2) of the *Restatement (Second) of Contracts*[42] that charitable subscriptions be enforced without proof of consideration or reliance, although he is quite aware of that rule's mixed reception in the courts.[43] A charitable subscription could thus qualify as a simple donative promise, and yet its enforcement might be justified on public policy grounds. Thus, the most precise formulation of Professor Eisenberg's view might be to say that simple, *affective* donative promises are, and should be, unenforceable. This, I think, is the full specification of what Professor Eisenberg calls the "donative promise principle."

He is, of course, quite aware that the claim he is making is not a terribly broad one—certainly nothing like the breadth of the classical requirement of consideration.[44] However, he nonetheless regards it—rightly, in my view—as extremely significant.[45] Given the trend in modern contract law to enforce all

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36. *Id.* at 823-24 n.14.

37. *Id.* at 823-24.

38. *Id.* at 823-25.

39. *Id.* at 822, 834, 851.

40. *Id.* at 822.

41. *Id.* at 822-23. At times, Professor Eisenberg uses the phrase "donative-promise principle" to refer more narrowly to the descriptive claim that simple donative promises are not, in fact, enforceable under our system of contract law. *Id.* at 822. However, he also clearly endorses the normative claim that simple donative promises should not be enforced (i.e., that the descriptive donative promise principle is justified), *id.* at 847-49, and I shall sometimes use the term to refer collectively to both the descriptive and normative claim.

42. RESTATEMENT (SECOND) OF CONTRACTS: PROMISE REASONABLY INDUCING ACTION OR FORBEARANCE § 90(2) (1981).

43. Eisenberg, *Contract and Gift*, *supra* note 1, at 852, 861.

44. *Id.* at 822-23.

45. *Id.*

commercial promises—even though some are technically gratuitous—the donative promise principle is the new doctrinal fault line between contract (properly understood) and promises that fall on the wrong side of the doctrine of consideration.[46]

Professor Eisenberg's method for establishing the donative promise principle is essentially a balancing process in which the reasons for and against enforcing simple donative promises are weighed.[47] The range of relevant reasons is subdivided into substantive reasons and process reasons.[48] While Professor Eisenberg recognizes that there are some *substantive* reasons to enforce simple donative promises, he regards those reasons as either weak or indeterminate and heavily outweighed by serious *process* reasons not to enforce donative promises and, even more importantly for purposes of this Article, decidedly stronger *substantive* reasons not to do so.[49]

Professor Eisenberg identifies two substantive reasons in favor of enforcing simple donative promises.[50] First, like any other promise, a simple donative promise creates an expectation in the promisee, and the promisee suffers a disappointment of that expectation if the promise is not kept.[51] However, Professor Eisenberg argues, that expectation is likely to be weak and the disappointment correspondingly slight.[52] Second, "donative promises as a class

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46. *Id.*

47. *Id.* at 825.

48. *Id.* at 828.

49. *Id.* at 823.

50. *Id.* at 828.

51. *Id.*

52. *Id.*; *see also* Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 3 (1979) [hereinafter Eisenberg, *Donative Promises*]. It is possible to question the accuracy of this claim, which is essentially an empirical premise. Recall that the subject under discussion is the simple, *affective* donative promise, which, by definition, is made between family members, friends, or others in a similarly close relationship. It seems to me that, at least in some instances, the disappointment suffered by a donative promisee is likely to be far more intense than that suffered by a bargain promisee. If the new computer I order from an online vendor fails to perform as warranted in our bargain, my disappointment will amount to annoyance, perhaps even serious annoyance. However, if my father had promised to finance my college education and then reneged, the intensity of disappointment would have risen to the level of heartbreak, precisely because of the affective relationship. In some instances, at least, bargain promisees may feel merely disappointed, while donative promisees feel betrayed.

Nevertheless, I think Professor Eisenberg is right that the promisee's disappointment is probably not a sufficient reason to enforce donative promises, although I also think disappointment of expectations in that sense is not the reason we enforce bargain promises, which Professor Eisenberg seems to regard as generating stronger expectations. The problem with discussions of "compensating disappointed expectations" is that there is a danger of equivocating between two senses of the word "expectation." I assume most promisees (of whatever variety) subjectively anticipate that their promisors will perform, and it is natural to characterize that subjective anticipation as "expectation." If the promisor breaks his promise, the disappointment of that

probably tend to move assets from persons with more wealth to persons with less."[53] Professor Eisenberg thus rejects the view that donative promises do not or cannot enhance utility.[54] However, he emphasizes that the overall economic effects of making simple donative promises enforceable are indeterminate.[55] The prospect of enforcement might result in more performance of donative promises, with a resulting increase in the number of completed gifts and gravitation of the subjects of gifts to users who value them more highly.[56] On the other hand, prospective gift promisors' concerns about possible regret contingencies might result in less gift promising, fewer completed gifts, and a consequent reduction in efficiency.[57]

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subjective anticipation is a form of emotional or psychic harm. However, that is not the sense of "expectation" relevant to contract law. If the reason we enforced promises was to compensate for disappointment *qua* psychic injury, our remedial scheme would be strangely incoherent. The general rule is that, absent exceptional circumstances, we do not award damages for emotional injury resulting from the breach of a contract. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS: LOSS DUE TO EMOTIONAL DISTURBANCE § 353 (1981). It would be impossible to explain that rule if the general reason for enforcing promises were a concern for psychic harm. I agree with Professor Eisenberg that the reasons we enforce promises at all are relevant to our choice of remedies and vice versa. *See* Eisenberg, *Donative Promises*, *supra*, at 1-2; Eisenberg, *Principles*, *supra* note 33, at 640. Accordingly, the rather inflexible limitation on emotional distress damages suggests to me that "subjective anticipation" has little to do with our grounds for enforcement of promises. In the sense in which "expectation" is relevant to contracts, it refers to a hypothetical state of affairs that would have been obtained had the breaching promisor performed instead of breaching. When we speak of "protecting expectations," we are generally referring to awards of expectation damages that reproduce, insofar as money can do so, the economic equivalent of that hypothetical state of affairs. While compensation for any emotional distress might theoretically be a component of that expectancy, we decline to include it, presumably for reasons Professor Eisenberg would classify as process reasons. There are, of course, many respects (e.g., attorneys' fee limitations, the limit of foreseeability) in which we do not provide full compensation for the expectancy in the second sense.

53. Eisenberg, *Contract and Gift*, *supra* note 1, at 828; *see also* Eisenberg, *Donative Promises*, *supra* note 52, at 4.

54. Eisenberg, *Contract and Gift*, *supra* note 1, at 829.

55. *Id.* at 828.

56. *Id.*; *see also* Eisenberg, *Donative Promises*, *supra* note 52, at 4.

57. Eisenberg, *Contract and Gift*, *supra* note 1, at 828. Indeed, there are other relevant economic factors as well. For example, as Professor Eisenberg observes, the donative promise principle seems to be the last component of the doctrine of consideration that scholars are prepared to defend. *See id.* at 828-31. Yet the rules relating to consideration are alive in the courts and form an extraordinarily complex doctrinal edifice. It is arguable that enforcing simple donative promises would permit the abandonment of that old edifice with consequent improvement in judicial efficiency. *Id.* More fundamentally, however, one must ultimately agree with Professor Eisenberg's claim that the economic effect of making simple donative promises enforceable is indeterminate in the sense that one cannot predict with certainty whether enforcing them would, on the whole, enhance or diminish efficiency. This, however, is by no means a problem peculiar to

Against these weak substantive reasons in favor of enforcing donative promises, Professor Eisenberg initially musters some process reasons not to enforce them.[58] Donative promises generally are too easy to fabricate, and *affective* donative promises, which by definition arise in a close relationship, are far too likely to be made without adequate deliberation.[59] Furthermore, enforcement of donative promises would require adjustments elsewhere in our system of contract law that would render it excessively messy and complicated.[60] For example, in civil law systems, where donative promises are sometimes enforced, there are special defenses (e.g., improvidence and ingratitude) that

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the question whether donative promises should be enforced. As Professor Eric Posner has observed, indeterminacy seems to be a pervasive problem with economic models of contract law sufficiently sophisticated to take account of the full range of variables and incentives that may be affected by legal rules. Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 838, 853-54 (2003). Posner's best example, in my view, is his discussion of the continuing controversy among economics scholars over the question of which remedy—expectation damages, reliance damages, or specific performance—is the most efficient contract remedy. *Id.* at 834-39. The relevant range of variables for analysis includes the incentive to breach or perform, the incentive to invest in reliance, the incentive to search for optimal partners, the incentive to reveal information, the incentive to take precautions against breach, the incentive to renegotiate after information is revealed, the possibilities for contract design, and the ability of courts to acquire or verify relevant information. *Id.* Any single remedial rule my have adverse economic effects on one or two of these incentives and variables and desirable effects on others. *Id.* One can draw conclusions of relative efficiency only by isolating one or two variables and drawing very cautious conclusions. *Id.* Aggregating all the variables and drawing an overall conclusion concerning efficiency appears impossible in the absence of a vast amount of empirical information that is unknown and, as a practical matter, impossible to gather. *Id.* No one, of course, should draw the conclusion that the economic analysis of law should be abandoned simply because it has not produced a comprehensive theory of contract in the mere thirty years Posner identifies as the period of its existence. *Id.* However, Posner's analysis does suggest that the indeterminacy in the economic effects of providing a remedy for simple donative promises should not count for much either in favor of or against enforcing them. *See id.* at 854-55.

58. Eisenberg, *Contract and Gift*, *supra* note 1, at 828.

59. *Id.* I have previously expressed my skepticism concerning the adequacy of this explanation for refusing to enforce donative promises. Wessman, *Gatekeeper II*, *supra* note 3, at 828-29. Although it is impossible to prove, it seems likely that there are more imprudent bargains than imprudent gift promises. *Id.* Yet contract law neither refuses to enforce bargain promises on that ground nor overtly polices bargain promises for impulsiveness or imprudence. *Id.* Indeed, the instances of people donating themselves into insolvency are extremely rare, although there is one recent and rather spectacular example. *See* James B. Stewart, *The Opera Lover: How Alberto Vilar's Passion for Philanthropy Landed Him in Jail*, NEW YORKER, Feb. 13, 2006, at 108 (recounting the story, and ultimate financial collapse, of philanthropist who made charitable donations of nearly 300 million dollars between 1996 and 1999). However, such instances are newsworthy precisely because they are so unusual.

60. Eisenberg, *Contract and Gift*, *supra* note 1, at 828-29.

must be developed in order to tailor the system to the morality of gift promises.[61] Those defenses require resolution of issues that would strain the capacity of our system.[62]

The process concerns identified by Professor Eisenberg have been the subjects of extensive scholarly debate. Because, in previous work, I have examined those process concerns and sided with those who regard them as either exaggerated or best remedied by devices other than the retention of a requirement of consideration,[63] the most important arguments made by Professor Eisenberg, in my view, are the more novel ones that come next. Specifically, he argues that there are two substantive reasons not to enforce simple donative promises. The more easily comprehensible of the two builds on the third process concern he identified earlier. Close attention to the morality of gift promises, he argues, reveals a problem even deeper than the need to import special legal defenses to which our system is unaccustomed and ill-adapted.[64] Donative promises, as part of the world of gift, are subject to an extremely "fluid" range of implied moral excuses. Indeed, the implication seems to be that the range of excuses is so "fluid" that it could never be specified completely.[65] Tailoring our legal system to the morality of gift promises and their corresponding excuses is more than asking our system to do something for which it is ill-qualified; it is asking our system to do the impossible. Indeed, the range of legitimate excuses for refusing to perform donative promises is so extensive that the disappointed promisee is normally morally obliged to release a repenting promisor.[66] Failure to do so is to be ungenerous, and we should not give "legal muscle" to ungenerous donative promisees by making simple donative promises enforceable.[67]

Judging by the time he spends on it, Professor Eisenberg regards the other substantive objection to enforcing simple donative promises as even more serious. It is also a bit more difficult to restate. Invoking his metaphor of the "world of gift," Professor Eisenberg argues that the world of gift would be "impoverished" if simple donative promises were subjected to a regime of legal enforcement.[68] This impoverishment would result from the "commodification" of the gift relationship.[69]

While the concept of "commodification" is neither specifically defined nor intuitively transparent, it seems to refer to some form of degradation of the particular functions of gifts and gift promises caused by enforcing the latter, presumably with an award of money damages. Gifts and gift promises are motivated by affective considerations, and they have an expressive or "totemic"

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61. *Id.*
62. *Id.* at 829.
63. Wessman, *Gatekeeper II*, *supra* note 3, at 828-31, 836-40.
64. Eisenberg, *Contract and Gift*, *supra* note 1, at 829, 831 n.32, 849-50.
65. *Id.* at 829.
66. *Id.* at 849-50.
67. *Id.* at 850 n.70.
68. *Id.* at 847-49.
69. *Id.*

function, in that a gift "reflects or manifests the relationship with the donee."[70] Gifts are one way we "indicate our favorites."[71] That is why, even if a gift is a gift of a commodity with monetary value, the commodity is not its main point, and its value is not exhausted by the value of the commodity.[72] To subject gift promises to legal enforcement would be to debase them by clouding the promisor's motives at the time of performance (from both the donor's and donee's perspectives),[73] converting the gift promise into a "cash equivalent" or a "bill of exchange,"[74] and submerging "the affective relationship that the gift was intended to totemize."[75] We should avoid thus degrading the world of gift because the "world of gift is a world of our better selves, in which affective values like love, friendship, affection, gratitude, and comradeship are the prime motivating forces."[76] The somewhat ironic consequence is that donative promises should remain unenforceable, not because they are too trivial to merit enforcement, but because they are too important to be subjected to a legal regime.[77]

B. Criticism

1. The Complicated Concept of Commodification.—I shall first address Professor Eisenberg's argument based on the concept of "commodification," as it seems to be the laboring oar among his substantive reasons for the donative promise principle. In order to evaluate the argument, it is necessary, as an initial matter, to explore in more detail what it means to "commodify" something and why (or when) "commodification" results in the degradation or debasement of the thing commodified.

That initial step is not entirely easy. The terms "commodify" and "commodification" are somewhat slippery and have been used in a variety of ways.[78] In invoking the notion of commodification, Professor Eisenberg expressly attributes the concept to a path-breaking article on the subject by Margaret Jane Radin.[79] Radin, in turn, discusses what "commodification" means

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70. *Id.* at 844.
71. *Id.* at 848.
72. *Id.* at 844.
73. *Id.* at 848.
74. *Id.*
75. *Id.*
76. *Id.* at 849.
77. *Id.*
78. Martha M. Ertman & Joan C. Williams, *Preface: Freedom, Equality, and the Many Futures of Commodification*, *in* RETHINKING COMMODIFICATION 1, 2-5 (Martha M. Ertman & Joan C. Williams eds., 2005) (distinguishing different meanings of "commodification"); Note, *The Price of Everything, the Value of Nothing: Reframing the Commodification Debate*, 117 HARV. L. REV. 689, 689-90 (2003) (same).
79. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987), *cited in* Eisenberg, *Contract and Gift*, *supra* note 1, at 847 n.64.

in some detail.

The term is obviously derived from the noun, "commodity," and Professor Radin describes a commodity as having three essential characteristics. First, it is "monetizable"; it has an "exchange value" that can be expressed in monetary terms.[80] Second, it is fungible; it is interchangeable with any other commodity, and any individual should be indifferent amongst the possession of the particular commodity, a commodity of equivalent value, or the sum of money it is worth.[81] Finally, it is detachable from the individual who owns or possesses it and, in principle, fully alienable.[82]

In a narrow sense, to say that something is "commodified" is simply to say that it is the sort of thing bought and sold in a recognized market.[83] Even in a narrow sense, saying that something is commodified can imply quite a lot—"supply and demand pricing, brokerage and arbitrage, advertising and marketing, stockpiling, speculation, and valuation in terms of the opportunity cost of production."[84] In the broader sense (with which she is even more deeply concerned), Radin speaks of "commodification" as the use of *market rhetoric* and *market methodology* to characterize social interactions.[85]

The use of "market rhetoric" is the conceptualization of all interactions as sales and includes thinking of all the things people desire, aspire to, or need as if they all were ordinary fungible goods, i.e., commodities.[86] Goods to be bought and sold thus include not only bushels of wheat, but also "the functions of government, wisdom, a healthful environment, and the right to bear children."[87] "Market methodology" consists primarily of the use of cost-benefit analysis to evaluate interactions in terms of potential gains from trade.[88]

It bears emphasis that neither Professor Eisenberg nor Professor Radin believes that nothing should be "commodified." Indeed, there is nothing to suggest that either has any objection in principle to the very large, well-organized markets for ordinary goods or more intangible property that characterize the current economy. Professor Radin's target, in particular, is not commodification as such, but "universal commodification," the view that all things and all interactions are appropriately characterized in market rhetoric and evaluated by market methodology.[89] What then, one might ask, should not be commodified? The short answer seems to be that things that are "personal" should not be.[90] "Personal" things, in this specialized sense, are things that are integral to the self

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80. *Id.* at 1857, 1859 n.44.
81. *Id.* at 1859-60 n.44.
82. *Id.* at 1859-60 n.44, 1881.
83. *Id.* at 1859.
84. *Id.* at 1855.
85. *Id.* at 1859.
86. *Id.*
87. *Id.* at 1860.
88. *Id.* at 1859, 1861.
89. *Id.* at 1861.
90. *Id.* at 1880-81.

and to a proper conception of human flourishing.[91] They include personal attributes (bodily integrity, sexuality),[92] relationships (family, love, friendship, and religion),[93] moral and political aspirations,[94] and even some intersections with the social and physical world (one's work, one's home).[95] Although it is difficult to articulate precisely, the "personal" seems to consist of all those attributes and things with which we identify, both in the sense that they are part of our self-image and in the somewhat deeper sense that they are part of who we are (or choose to be, to the extent we can create ourselves).

What, then, is the harm of commodifying the personal? In part, the harm is a form of error risk.[96] Cost-benefit analysis, and its attendant assumptions that everything is monetizable and fungible, tends to undervalue components of human well-being that people hold dear but that are difficult to evaluate in terms of money.[97] This sort of systematic undervaluation can lead to poor social decisionmaking. More fundamentally, however, universal commodification distorts, and even insults, personhood.[98] To speak of rape or prostitution in market terms, for example, is to treat bodily integrity as an object that can be owned and as something monetizable and fungible.[99] It degrades the value of the attribute commodified and insults the person whose bodily integrity is at stake.[100] Taken to an extreme, it reduces the self to an empty, ghostly possessor of detachable, fungible objects, entirely devoid of any individuating characteristics.[101] Finally, and perhaps most importantly for Radin, the way humans conceptualize the world—and here, I think, she is primarily talking about the social world—changes the world.[102] The complete dominance of market rhetoric and market methodology would lead to an inferior conception of what it is to be human and what it is for a human being to flourish.[103]

Commodification is obviously a complex concept, and the implications of its application to any particular phenomenon or interaction cannot be expected to be straightforward. In particular, it is not clear how much of Radin's rather expansive notion of commodification is implicitly incorporated into Professor Eisenberg's objection to the enforcement of simple donative promises. Accordingly, it is now necessary to take a closer look at his argument and analyze which aspects of the notion of commodification are implicated in any

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91. *Id.* at 1881, 1884-85.
92. *Id.* at 1879-81.
93. *Id.* at 1906.
94. *Id.*
95. *Id.* at 1918-20.
96. *Id.* at 1878.
97. *Id.*
98. *Id.* at 1879-81.
99. *Id.* at 1880.
100. *Id.* at 1881.
101. *Id.* at 1881, 1885.
102. *Id.* at 1881-86.
103. *Id.*

possible enforcement of simple donative promises and why those aspects of commodification would be objectionable.

2. Possible Implications of Commodification—

a. Market trading.—Initially, it is reasonably clear that by claiming that enforcement of simple donative promises would commodify them, Professor Eisenberg is *not* confining the notion of commodification, or his objection to it, to Radin's narrowest sense of commodification, in which something is commodified if it is actually bought and sold in a market.[104] To be sure, in specifying the essential differences between bargains and gifts, he does point out that, in a bargain transaction, it is considered perfectly permissible for the party who is promised delivery of a particular commodity to resell it immediately in the market.[105] In contrast, the recipient of a simple donative promise to give the same commodity would insult the donor by immediately reselling it.[106] A gift or gift promise, he contends, has an expressive or "totemic" function that manifests the affective relationship between the donor and donee, and bargain transactions characteristically do not.[107] It is this expressive function of the gift promise (or, for that matter, the completed gift) that seems somehow incompatible with resale.[108]

Nevertheless, it would be a mistake to assume Professor Eisenberg objects to enforcing donative promises out of fear that enforcing them would facilitate a secondary market in gift expectancies. There does not seem to be much of a market for promisees' interests under simple donative promises at the moment, and that may be due, at least in part, to the fact that such promises are unenforceable under current law. If they were enforceable, it might be easier to develop a market for them. Even if such a market were deemed undesirable, however, it would seem easy enough to prevent it without banning enforcement of gift promises entirely. The common law judges were, after all, able to devise limits on assignment and delegation in *bargain* transactions where it seemed desirable because of the personal character of the performance to be rendered by

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104. *Id.* at 1859.

105. Eisenberg, *Contract and Gift*, *supra* note 1, at 844.

106. *Id.*

107. *Id.*

108. Specifying the nature of the incompatibility and its strength, on the other hand, is somewhat difficult. In particular, I am not certain there would be universal agreement on the question whether a donee or donative promisee who resold the subject of a gift had committed an offense to etiquette or an offense to morals. Moreover, if one expands the discussion to donative transfers generally, social attitudes toward alienation and resale, and the legal responses to those attitudes, begin to appear more complicated. Bequests, of course, are a form of donative transfer, and they share a certain degree of insecurity with donative promises, in that there is nothing to prevent a testator from changing his will. Yet pledges or sales by potential beneficiaries of expectancies under wills have a long, if somewhat colorful, history. These complications, however, are not material to the present discussion. We may agree that it is generally regarded as, at the very least, supremely tacky to resell one's birthday gifts.

either party.[109] If restrictions on assignments of gift promises are even more broadly desirable, a blanket (or presumptive) prohibition of such assignments would seem to be an obvious (and even more administrable) judicial response. In principle, of course, a statutory restriction of such assignments is also possible.

It is extremely unlikely, at the outset, that Professor Eisenberg's objection to enforcing simple donative promises could be answered so easily. One may infer, therefore, that he is really arguing that enforcing simple donative promises would commodify them in Professor Radin's second, broader sense.[110] However, the exact mechanisms by which this commodification would take place and by which it would cause harm are not fully explained. In my view, the best way to explore what he means to say is to isolate and analyze specific strands of his argument that correlate to elements of Professor Radin's more expansive and systematic exposition of the meaning and implications of "commodification."

b. Monetization.—Initially, it is possible that Professor Eisenberg's objection to enforcing simple donative promises is an objection to the "monetization"[111] entailed by commodification. Presumably, if we were to enforce such promises, we would do so by providing a damage remedy, just as we do in the case of bargain promises. Absent the special circumstances that justify a decree of specific performance in the case of bargains, the typical judgment in a successful action on a simple donative promise would be an order that the defendant pay a specific sum of money. Some scholars have suggested that monetization itself is one evil of commodification, an expression of the value of something belonging to one sphere in terms of a metric appropriate to an entirely different, and incommensurable, sphere.[112] Such an interpretation of Professor Eisenberg's argument is suggested by his division of the transactional world into two "worlds," the world of contract and the world of gift.[113] It is also suggested when he observes that, though a gift may be a gift of a commodity, the commodity does not exhaust the value of the gift and is not even its most important aspect.[114]

It is quite clear that Professor Eisenberg adopts the view that an affective gift, properly understood, can never really be completely monetized, in the sense

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109. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 317-19 (1981) (summarizing common law limits on assignment of contractual rights, delegation of contractual duties, and delegation of performance of conditions).

110. *See* Radin, *supra* note 79, at 1859 (distinguishing narrow and broad senses of "commodification.")

111. *Id.* at 1857, 1859 n.44.

112. *See* Ertman & Williams, *supra* note 78, at 4 (describing the conventional assumption of "hostile worlds" formed by the economic arena and the arena of intimacy and altruism); *see also* Margaret Jane Radin & Madhavi Sunder, *Introduction: The Subject and Object of Commodification*, *in* RETHINKING COMMODIFICATION, *supra* note 78, at 8, 15-16 (describing and critiquing Michael Walzer's conception of separate "spheres"); Note, *supra* note 78, at 690-93 (attributing the view to Cass Sunstein, Andrew Kimbrell, and Elizabeth Anderson).

113. Eisenberg, *Contract and Gift*, *supra* note 1, at 823-24.

114. *Id.* at 844.

that there is residual value in a gift after one has completely expressed the monetary value of the commodity (if any) that is the subject of the gift.[115] He may also accept the view that this residual value is not properly or completely measurable in monetary terms. Both of those positions seem to me to be unassailable. However, even if one accepts them, it does not follow that simple donative promises should be unenforceable.

The reason that conclusion does not follow is that the assignment of a market value to a particular thing does not necessarily degrade or debase it. Professor Radin makes several observations in this regard that are instructive. There are some instances in which the mere assignment of a price to something is itself insulting or morally offensive.[116] To use two of her recurring examples, nearly everyone cringes at the mention of the market price of a healthy baby[117] or the costs (as opposed to the benefits) of rape.[118] However, not everything personal falls into this category.[119] Indeed, there are some things essential to the self-definition of most people that clearly have ascertainable market values but are neither insulted nor debased by monetary valuation.

Unless one finds one's job particularly loathsome, for example, one is likely to regard one's work as "part of who I am." It also seems plausible to say that most people in our culture regard their homes as, in some sense, expressions of themselves and as repositories of memories and experiences that cannot be quantified. Yet the market for labor is quite robust, and we often speak of the "going rate" for particular work. The market for houses rises and falls, but the real estate appraisers seem not to go hungry. The existence of the labor market offends no one but the few remaining committed Marxists,[120] and absent state or military control of the housing supply, it is difficult to understand how housing could be allocated except by sale and rental markets. More importantly, the existence and vigor of those markets misleads very few into thinking that the value of work is exhausted by wages or that the value of a home is exhausted by its price.[121] Such assumptions would be mistakes, perhaps even offensive ones, but we do not typically make them.

Similarly, it does not seem likely that providing a damage remedy for breach of a simple donative promise would deceive anyone into believing that the sum awarded in damages exhausted the value the promisee would have derived from the gift had it been completed. To be sure, individuals sometimes refer to

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115. *Id.*

116. Radin, *supra* note 79, at 1880-81.

117. *Id.* at 1925-28.

118. *Id.* at 1879-81.

119. *Id.* at 1906, 1908-09.

120. We may, I think, safely ignore both of them.

121. The examples of work and home are drawn from Radin, who uses them as examples of "incomplete commodification," i.e., things that have a market value but whose value to most people is not exhausted by value in the market. Radin, *supra* note 79, at 1914, 1918-21. Indeed, she concedes them to be examples of instances in which partial commodification of a thing does not have a domino effect leading to elimination of the non-commodified version of the thing. *Id.*

expectation damages as the monetary "equivalent" of performance or as putting the aggrieved party in the "same position" as full performance. When we are careful, however, we are compelled to admit that such statements are exaggerations, a sort of shorthand expression of our primary remedial goal without all its qualifications.

We may start with a presumption that an aggrieved plaintiff in contract is to be given the "value of the promised performance." However, there are more specific rules that chip away at the potential recovery and deny the plaintiff the full equivalent of the performance of the promise. Some rules, like the refusal to shift the victorious party's attorneys' fees to the loser, amount to a refusal to award perfectly quantifiable forms of loss for reasons of policy, including the policy in favor of facilitating resort to the courts.[122] The duty to mitigate damages sometimes dictates that quantifiable losses, though actually suffered and easily calculated, may not be recovered in order to serve a policy in favor of minimization of the costs of contractual failure.[123] Other rules, such as the prohibition of the recovery of damages for emotional distress in an action on a contract, seem to be motivated, at least in part, by the very difficulty of quantification.[124] Indeed, most courses in contract law probably include some consideration of a case or two in which, even when the court is trying to compensate the plaintiff in full for breach of an ordinary bargain promise, it falls short because some component of "personal" value is neglected.[125] No serious student of common law contractual remedies would be tempted to infer from the provision of a damage remedy that the remedy was the *full* equivalent of the value of the promise. There are a variety of ways in which our damage remedies, for reasons of social policy, fail to provide the full value of the broken promise (or its hypothetical performance). However, there is nothing about that fact that insults or debases the interest we are trying to compensate. It merely reflects the fact that multiple policies are at work in our system of contract remedies, and we sometimes are required to make trade-offs among them.

In sum, Professor Eisenberg may be perfectly correct in asserting that a damage remedy for breach of gift promises would, as a practical matter, provide incomplete compensation because gifts are not fully monetizable. However, it does not follow that the incompleteness of the remedy distorts our perceptions of the value of gifts in general or particular gift transactions. Nor does it follow that no remedy at all is superior to incomplete compensation. We certainly do not accept that conclusion in the case of bargain promises, and Professor

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122. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 14.35 (4th ed. 1998) ("The apparent rationale is that a contrary rule would discourage impecunious plaintiffs from prosecuting meritorious claims.").

123. RESTATEMENT (SECOND) OF CONTRACTS: AVOIDABILITY AS A LIMITATION ON DAMAGES § 350(1) cmt. a (1981); 3 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 12.12 (3d ed. 2004).

124. 11 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 59.1 (rev. ed. 2005) ("Mental distress is not itself a pecuniary harm, and it can scarcely be said to be measurable in terms of money.").

125. *See, e.g.*, Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109 (Okla. 1962).

Eisenberg has not supplied persuasive reason to accept it in the case of donative promises.

c. Fungibility.—Further strands of Professor Eisenberg's argument require exploration because they suggest he may be focusing on other elements of the notion of commodification. At one point, he argues that enforcing donative promises would degrade donative promises into bills of exchange and the performance of donative promises into the redemption of bills.[126] This somewhat hyperbolic argument is reminiscent of a second aspect of commodification identified by Professor Radin. Specifically, to "commodify" something is to imply or accept the view that it is fungible, in the sense that one who holds it should be indifferent amongst holding that thing, an equivalent sum of money, or another thing with the same monetary value.[127] In a similar vein, other scholars have suggested that the vice of commodification goes beyond confusing spheres of valuation by "monetizing" something that cannot be valued in money. It consists also in the *assertion of equivalence* between the incommensurable spheres of valuation that have been confused.[128] If this is the aspect of commodification Professor Eisenberg wishes to incorporate, his argument is that the existence of a damage remedy for a broken donative promise would not only fail to capture important but unquantifiable elements of the value of the promise, but also generate some sort of implication that the remedy had, contrary to fact, captured all that there is to capture.

Assuming that Professor Eisenberg is thus making an argument based on the undesirability of false implications of fungibility, there is at least one intuitive objection to his argument. Assume that there are incommensurable spheres of valuation and that the assertion of equivalence between things that inhabit different spheres is at least deceptive and perhaps degrading to one sphere. Would one not intuitively suspect that the primary culprit in generating such an implication of equivalence would be the voluntary *exchange* transaction, not the voluntary gift or the forced transfer by way of legal remedy?[129]

If we believe the economists (or indulge their assumptions), each party to an exchange transaction values what she receives more highly than what she gives up.[130] We may infer that, in some range of exchange transactions involving things of incommensurable value, at least one party is making a false assumption of equivalence. To use the obvious example, if a market for babies is permitted

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126. Eisenberg, *Contract and Gift*, *supra* note 1, at 848.

127. Radin, *supra* note 79, at 1859-60 n.44.

128. *See* Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets*, *in* RETHINKING COMMODIFICATION, *supra* note 78, at 122, 124 (describing the "assumption that informs much market-oriented thinking" that "all goods are commensurable, that all goods can be translated without loss into a single measure or unit of value"); *see also* Note, *supra* note 78, at 703-10 (articulating and exploring the ramifications of transactions expressive of value equilibrium).

129. Note, *supra* note 78, at 705-07 (arguing that gifts, compensatory damages, and life insurance do not express value equilibrium).

130. Eisenberg, *Principles*, *supra* note 33, at 643.

and a baby is sold to adoptive parents, one fears that at least one party undervalues the baby, not in the sense that she demands or pays the wrong price, but in the sense that she mistakenly assumes babies can be valued in money.[131] However, it is difficult to see why or how gift transactions or promises could generate the same kind of undesirable implications.

Even if one accepts the notion that a trade "implies" that the things traded are commensurable and equivalent (or that the parties to the trade believe that they are), gifts and donative promises, by definition, are not trades, as Professor Eisenberg rightly emphasizes.[132] Therefore, his argument must be that the provision of a damage remedy for a broken donative promise is, in effect, a forced sale of the promise for the "price" of the damage award and that the forced sale generates the implication that: (a) the value of the donative promise (or the completed gift it might have become) is appropriately expressed solely in monetary terms; and (b) that the damage award exhausts that value.

Yet the *coercive* character of legal remedies seems incompatible with any such "implication." Part of what makes it plausible to assert that parties to trades "imply" that the things traded are commensurable and equivalent in value is that the parties to a trade *agree* to it. That is why it makes sense to suppose the trade reflects their value judgments. It is difficult to imagine, however, how or why the same implications should arise if a disappointed donative promisee is able to harness the coercive mechanisms of the state to force the defaulting promisor to pay whatever the state, through its courts, deems appropriate. Why should it be assumed that, by invoking the damage remedy, the promisee reflects his belief that the damage award is just as valuable as the completed gift would have been

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131. The inference is far from iron-clad. There is the theoretical possibility that the seller only cares about money, and the buyer only cares about children. In that event, both will be willing to make the sale, but neither asserts nor implies that it is an exchange of equivalents. A more realistic possibility is that neither the buyer nor the seller believes babies can be valued in money, but the seller is compelled by dire poverty to sell the baby anyway. Some scholars object to commodification precisely on the grounds of its potentially coercive and adverse distributional effects. *See* Radin & Sunder, *supra* note 112, at 11 (noting that "[u]nequal distributions of wealth make the poorest in society, with little to offer in the marketplace, more likely to commodify themselves"); Sandel, *supra* note 128, at 122-23 (distinguishing commodification arguments from coercion from commodification arguments from corruption); Note, *supra* note 78, at 690-91 (articulating further variations in arguments from coercion). Because this strain of commodification theory does not feature in Professor Eisenberg's discussion of donative promises, I have ignored it for purposes of this Article. More pertinent for purposes of this Article is a rather large and obvious class of common transactions that involve exchanges without any implication of equivalence. If I buy a life insurance policy or an accidental death and dismemberment policy, I do not thereby accept or imply that my life or limbs are only as valuable as the sum for which they are insured, or even that they can be valued in money. All I imply, if anything, is that there would be adverse economic consequences if I lost them and that I want to guard myself or my loved ones from those potential consequences. Thus, even observable *voluntary* exchange transactions do not *necessarily* involve an implication of equivalence.

132. Eisenberg, *Contract and Gift*, *supra* note 1, at 841-46.

or his indifference between the two?

Although Professor Eisenberg does not, Professor Radin provides the building blocks of an argument that the provision of a judicial damage remedy generates an implication of equivalence between the money damages and the subject matter of the promise or contract for which the damages are a remedy.[133] She suggests, for example, that even if the government decriminalizes prostitution, it should not provide a contractual damage remedy in the event of a refusal to perform.[134] Such a damage remedy would be "tantamount to complete commodification" of sexuality because an "official entity" would place a "fungible value" on the promised performance.[135] She does not specifically say why an "official" pronouncement would be particularly conducive to complete commodification, either generally or with respect to sexuality in particular. However, she argues that one of the dangers of market rhetoric and methodology is that it sometimes has a domino effect, in that the commodified version of a thing or attribute can crowd out the more desirable, non-commodified version.[136] She also regards sexuality as particularly vulnerable to the domino effect.[137]

Whatever one thinks of the foregoing argument as applied to the somewhat special case of sexuality, a certain degree of general skepticism concerning the commodifying effect of "official" acts or pronouncements is warranted. Are we really to suppose that, if a damage remedy is available for breach of a gift promise, people will begin to believe that damages are equivalent in value to a completed affective gift (including its "totemic" aspects) or that they will be indifferent between the two? It certainly would not be a *rational* inference for them to draw, given the fact that the damage remedies in contract law, in some respects, provide less than full compensation even for elements of loss that are quantifiable.

Is there some reason to suppose people will draw such inferences irrationally, as a kind of subliminal effect of the availability of damages? It is difficult to see why they would. Particularly in the field of torts, in which there are damage remedies for all sorts of injuries that are difficult to quantify, there are no apparent subliminal effects of that kind. Someone who recovers damages in battery for a beating or for intentional infliction of emotional distress is not likely to conclude that the value of bodily integrity or emotional well-being is completely expressed in money and that the money is just as satisfactory. Nor does it seem plausible to suppose that jurors or other outside observers would draw such a conclusion. State-mandated worker's compensation schemes provide detailed (some would say ghoulish) schedules of "benefits" for specific types of injury, and no one seems to conclude that the monetary amounts specified are interchangeable with body parts. One may doubt that the provision

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133. Radin, *supra* note 79, at 1923-25.

134. *Id.* at 1924.

135. *Id.*; *see also* Margaret Jane Radin, *Contested Commodities*, *in* RETHINKING COMMODIFICATION, *supra* note 78, at 81, 90-91 (articulating a similar argument more recently).

136. Radin, *supra* note 79, at 1912-13.

137. *Id.* at 1922.

of a damage remedy even *expresses* some sort of public judgment of fungibility. More importantly, it seems unlikely that the public at large would be deceived or confused by the "official" pronouncement of equivalence, even if it existed.

Thus, there is little reason to believe that enforcing simple donative promises would lead to undesirable monetization or assumptions of fungibility, as Professor Eisenberg suggests. However, there is still more to his argument than has been articulated up to this point. Specifically, there are two more strands of his argument that find parallels in Professor Radin's extended analysis of the concept of commodification.

d. The transformative power of commodification: Epistemic uncertainty.— Professor Eisenberg makes two arguments that are reminiscent of Professor Radin's claim that market rhetoric and methodology have a kind of transformative power—a power to change the social phenomena they are used to describe and analyze. Eisenberg first argues that if a damage remedy were available for simple, affective donative promises, the resulting commodification would disable the promisee (and perhaps even the promisor) from knowing whether the promisor's performance was motivated by the same love, friendship, or affection that generated the promise in the first place, or whether it was motivated by a desire to discharge a legal obligation or avoid a lawsuit.[138] At the point at which the promisor is called upon to perform, his motives would inevitably be mixed.[139] The ambiguity in the promisor's actual and apparent motives would effectively degrade the gift, as it would no longer be, or be perceived to be, an expression of the affective relationship between the donor and donee.[140]

It is important, at this point, to distinguish the subtle claim Professor Eisenberg is making from a more obvious one upon which he does not rely. He is not simply arguing that a donative promisor who must be sued and coerced into paying a judgment is no longer acting out of love. The motives of such a promisor are quite transparent. Rather, Professor Eisenberg is arguing that even the theoretical availability of a damage remedy clouds the motives of a donative promisor who, in fact, performs voluntarily.

This argument exaggerates both the difficulty of assessing the motives of others and the importance of being certain about them. We do not directly perceive the thoughts, feelings, and motives of other human beings in the immediate way we experience our own. If the requisite kind of knowledge is Cartesian certainty, it must be conceded that a donative promisee will not "know" what precisely moves the promisor to keep his promise. However, that is true whether the donative promise is legally enforceable or not. There are, after all, a range of motives to keep a donative promise, even if it is not enforceable and even if the promisor secretly would prefer not to perform. The promisor might perform out of a desire to avoid a confrontation with the promisee, out of a desire to avoid a loss of reputation among other friends or family members, or simply

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138. Eisenberg, *Contract and Gift*, *supra* note 1, at 848.

139. *Id.*

140. *Id.*

out of a desire to preserve a self-image as a person of his or her word. The promisor's motives can never be fully transparent, and the cloud of our ignorance of them is not made materially darker or lighter depending on whether or not the promise in question carries a legal remedy.

Though troubling to philosophers, this kind of theoretical uncertainty is not of great practical importance. Normally, we do not require Cartesian certainty. If it becomes important to us to ascertain the motives of another person, we make judgments about those motives based upon what the person says, what she does, what gestures she makes, what we have learned over time about her character, and a variety of other factors. To be sure, those judgments are at best educated guesses from a strict philosophical point of view. They serve our purpose despite their status as educated guesses, presumably because they are the best that we can do. Thus, even assuming it is important to the preservation of the peculiar character or "totemic" aspects of gifts and gift promises that the promisor's motives for performing be assessed, the myriad factors that make such assessments practically possible are available whether the promise is enforceable or not.[141] Indeed, since the prototypical cases of simple donative promises are those between family, friends, and other close associates, the cues we usually use to interpret motives (especially those based on long familiarity) would seem to be more readily available precisely because of the affective relationship.

e. The transformative power of commodification: Poisoning the well.— Closely on the heels of the argument just discussed, Professor Eisenberg makes a second, conceptually distinct claim about the way in which enforcing donative promises would commodify them and thereby transform and degrade them as social phenomena. Gifts and gift promises, it should be recalled, express the donor's relationship with and affection for the donee.[142] Affection of that kind, once withdrawn, cannot be restored by compulsion.[143] However, if there is to be a damage remedy for the breach of a donative promise, it must take the form of a forced transfer. The problem is that a compelled "gift" has lost its "gift-ness."[144] It no longer performs the expressive function it might have, i.e., it no longer reflects and expresses the affective relationship between promisor and

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141. Indeed, there is nothing unique about gift promises in this respect. Even the recipient of an ordinary bargain promise may have every bit as good a reason as the recipient of a donative promise to want to know what moves the promisor to perform. Continuing relationships and trust play an important role in the business world. The parties to recurring bargain transactions might be dramatically more comfortable if each believes the other performs for reasons other than the fear of legal sanctions. If that is sometimes important, however, the fact that legal sanctions have long been available for bargain promises does not seem to prevent the parties to bargains from determining that performance actually occurs for more noble reasons.

142. Eisenberg, *Contract and Gift*, supra note 1, at 844.

143. *Id.* at 848.

144. *Id.* (quoting Thomas Mayhew, Discussion Questions for Seminar in Contracts Theory (unpublished paper, on file with author)).

promisee.[145] Enforcement of the gift promise effectively destroys the gift.[146]

The argument has great intuitive appeal, largely because most of its premises are true. A compelled gift is indeed no gift at all. Legal remedies are not and cannot be anything but a form of compulsion by the state. Nevertheless, the argument is mistaken.

It may be observed, initially, that providing a legal remedy for breach of a bargain promise destroys the underlying bargain in the same sense in which enforcing a donative promise destroys the gift. A bargain transaction is a voluntary transaction *by definition*, just as a gift transaction is. If Leviathan enforces a bargain promise by compelling the payment of damages, the party compelled to pay is no longer willingly fulfilling a voluntary bargain.

Although there seems to be universal agreement that we should (and do) enforce bargain promises, there remains much disagreement about the reasons why. Some argue that we should enforce them because enforcing exchange promises enhances utility or social and economic coordination,[147] while others argue that enforcement serves moral ideals such as autonomy.[148] Whatever the true or best reasons are, however, one thing is clear: we do not enforce bargain promises because we are under an illusion that a transfer forced by the state can recreate the halcyon days when the two parties to a bargain contemplated and agreed on a voluntary exchange. However, the destruction of the bargain *qua* voluntary transaction actually precedes the intervention of the state. One party's decision to *breach* is what really puts an end to the underlying, voluntary bargain. We attach a legal sanction because doing so fits our best conception of sound morals or good social policy.

Similarly, in the case of a donative promise, the promisor's decision to break the promise destroys the contemplated gift, in that it represents (or may represent)[149] a withdrawal of affection. If we make a social decision to provide the disappointed promisee a damage remedy, it is not because we believe we can turn back the clock and restore the affective relationship or the voluntary character of the gift. That means that there is an important sense in which damages are incomplete. However, if, as I (and many others) have argued at length elsewhere,[150] the very reasons that support enforcing bargain promises support enforcing gratuitous promises as well, the fact that the remedy must take the form of a forced transfer should be no barrier to enforcement in either case.

Thus, when one separates the strands of Professor Eisenberg's argument and

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145. *Id.*

146. *Id.*

147. Professor Eisenberg has long held this view. Eisenberg, *Contract and Gift*, *supra* note 1, at 835-36; Eisenberg, *Principles*, *supra* note 33, at 643, 652.

148. *See* CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 1-6 (1981); *see also* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806-10 (1941).

149. The qualification is necessary, because a donative promisor who breaks his promise because it is simply impossible to keep does not signal a withdrawal of affection from the promisee.

150. *See* Wessman, *Gatekeeper II*, *supra* note 3, at 715-16, 819-26.

unpacks the concept of "commodification," that concept provides little direct support for a substantive argument against enforcing simple donative promises.[151] Professor Eisenberg's second substantive argument against enforcement must now be addressed.

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151. The qualifier "direct" must be added because a brand-new form of commodification argument appeared very recently in David Gamage & Allon Kedem, *Commodification and Contract Formation: Placing the Consideration Doctrine on Stronger Foundations*, 73 U. CHI. L. REV. 1299 (2006). The authors develop an argument for the conclusion that the presence of at least nominal consideration should be both "a necessary and sufficient condition" for the enforcement of a promise. *Id.* at 1367. They do so, in part, by appealing to what they call "anticommodification norms." *Id.* at 1302. Such norms, they argue, prevent potential promisors and promisees from resorting to the expression of merely nominal consideration in certain social contexts. *Id.* at 1299. The social contexts in question include a range of gift promises.

Gift promisors and promises cannot resort to nominal consideration as a device for making a gift promise enforceable (when it otherwise would not be) because anticommodification norms prevent them from speaking in such terms. *Id.* at 1328. They further argue that such gift promises should not be made enforceable through the provision of some other legal device that the parties might deliberately invoke. *Id.* at 1337. Providing a mechanism for legal enforcement could generate an inefficient signaling spiral, as promisors in such transactions invoked the mechanism in order to signal their reliability to promisees. *Id.* at 1343-44. The spiral, in turn, could reduce overall welfare, both by binding promisors who really did not wish to be bound and by causing promisors to reduce the "size" (i.e., value) of what they promised to suboptimal levels. *Id.* at 1346. The details of the argument are intriguing and very complex. For present purposes, however, it is sufficient to emphasize that it is a very different kind of commodification argument than that made by Professor Eisenberg.

Professor Eisenberg's appeal to the notion of commodification is both normative and direct. He believes that commodification is bad and that enforcing simple donative promises would commodify them. Eisenberg, *Contract and Gift*, *supra* note 1, at 848-49. Therefore, according to Eisenberg, we should not enforce them. *Id.* In contrast, one might say that Professor Gamage and Mr. Kedem appeal to the notion of commodification indirectly and descriptively. Although one gets the impression that they do, in fact, subscribe to anticommodification norms, nothing about their analysis requires them to do so.

For their analysis, the significance of anticommodification norms derives from the status of those norms as empirical social facts. Gamage & Kedem, *supra*, at 1358. In our culture, people believe in anticommodification norms, and certain factual consequences follow. Given further hypothetical facts (in this case, an option to make gift promises legally enforceable), certain other factual consequences might follow, and if they did, those consequences would be undesirable. However, the reason they would be undesirable is because they reduce *welfare*. *Id.* at 1355-56. The norm that really drives the analysis of Professor Gamage and Mr. Kedem is welfare maximization/efficiency, placing them comfortably in the tradition of law and economics. Instead of making a direct ethical appeal to norms against commodification, the authors use them as causal links in a chain leading to inefficient outcomes.

In part because the argument is so different from Professor Eisenberg's, and in part because of its complexity, evaluating and responding to the Gamage-Kedem analysis would require a separate article. I hope to write such an article, but I will not attempt to do so here.

3. The Range of Excuses for Not Performing Donative Promises.—The second argument relies on certain premises about the "fluid" range of moral excuses for failing to perform a donative promise.[152] The argument is slightly ambiguous because the critical premise appears to have two versions, a strong thesis and a more moderate thesis.

The strong thesis is the proposition that there are so many excuses for failing to perform a donative promise that a donative promisee is always, or almost always, morally obliged to release a promisor who wishes to be released.[153] Accordingly, donative promises should not carry a legal remedy because any time a donative promisor has a reason not to perform he has no moral obligation to do so. Conversely, if the donative promisee needs the compulsion of the state to secure performance, or its monetary equivalent, it should not be available to him. Attaching legal sanctions to promises that are not even morally binding cannot be justified.[154]

The strong thesis is thus a claim that few, if any, donative promises are morally binding in circumstances in which the promisor would not want them to be. One must concede that, if the strong thesis were true, it would provide a reason not to enforce the simple donative promise. However, if the strong thesis is tested against our shared moral intuitions, I suggest there is little reason to believe it to be true. For example, consider the case of a mother who promises to finance her daughter's medical school education. Most people would agree that the mother has a moral excuse for breaking the promise if she falls seriously ill and incurs crippling medical expenses or if she suffers severe financial reverses that make her unable to perform except by rendering herself destitute. The same is probably true if the daughter physically assaults the mother or libels her publicly. Professor Eisenberg might add that the mother is excused if she finds she needs the money to start her own new business.[155] Surely, however, it matters very much *why* the mother wants to break the promise, and there are certain reasons that most people would find unacceptable. If the mother wishes to renege because, for example, it would interfere with her fondness for whisky

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152. Eisenberg, *Contract and Gift*, *supra* note 1, at 829.

153. "It may be wrong for a donative promisor to break a donative promise but also wrong for the promisee to insist on performance, because under the morality of *aspiration*, where a donative promise is made for affective reasons the donative promisee is normally obliged to release a repenting promisor." *Id.* at 849 (emphasis added).

154. There is a certain irony in this argument. Traditionally, scholars have emphasized that moral obligation is not alone a *sufficient* reason to enforce a promise. *See, e.g.*, Eisenberg, *Principles*, *supra* note 33, at 640 ("A promise, as such, is not legally enforceable."); *id.* at 643 ("As a substantive matter, the state . . . may justifiably take the position that its compulsory processes will not be made available to redress the hurt caused by every broken promise, but only to remedy substantial injuries, prevent unjust enrichment, or further some independent social policy, such as promotion of the economy.") The suppressed premise of Professor Eisenberg's more recent argument is that moral obligation, nevertheless, is or should be a *necessary* condition of enforcement.

155. Eisenberg, *Contract and Gift*, *supra* note 1, at 829.

or casino gambling or her desire to amass a fleet of sports cars, most people probably think she would wrong her daughter by breaking the promise.[156] The strong thesis thus exaggerates the range of moral excuses available to the donative promisor.

In part for that reason, it seems more plausible to attribute the moderate thesis to Professor Eisenberg. The moderate thesis is not a claim about how many or how few donative promises are morally binding, but is rather a claim about our ability to *describe* which ones are binding. More specifically, the moderate thesis is the claim that donative promises are subject to a broader range of moral excuses than other kinds of promises and, most importantly, that the range of moral excuses can never, even in principle, be completely specified.[157] Professor Eisenberg does not say why the range of excuses can never be a closed set, but it may have something to do with the restricted range of promises upon which he is concentrating his attention. Once charitable subscriptions are placed to one side,[158] the category of simple donative promises reduces to promises (without accompanying reliance) among family, friends, and close associates. The dynamics of such relationships are notoriously complicated. He may be arguing that no matter how comprehensive our list of moral excuses appeared to be, we could always imagine some interaction between donor and donee that could change the circumstances enough to generate an additional excuse.[159] The range of relevant factual variations defies any simple formulation of a rule on excuses. Accordingly, it is better to refuse enforcement of simple donative promises than to permit enforcement subject to a range of excuses we cannot ever really capture.

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156. Between the extremes of clearly meritorious excuses and clearly unacceptable ones, it is possible to imagine borderline cases upon which reasonable people might disagree. For example, if a mother wishes to break her promise to finance her daughter's medical school education to enable her to finance the law school education of a more devoted niece instead, there would probably be some disagreement about whether she was justified in doing so.

157. The moderate thesis may be what Professor Eisenberg means by the statement, "It is doubtful whether the formal legal system could deal adequately with the fluid nature of these excuses, because the equilibria of affective relationships are too subtle to be regulated by legal rules." Eisenberg, *Contract and Gift*, *supra* note 1, at 829. The moderate thesis is also suggested by his discussion of the claim by Professors Goetz and Scott that the terms of a donative promise, and particularly the regret contingencies that would cause a donative promisor to wish to renege, are normally incompletely specified in the promise. *See id.* at 830-31 (discussing Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261 (1980)).

158. Professor Eisenberg approves of enforcing promises to donate to charities on grounds of public policy. *See supra* note 43 and accompanying text.

159. For example, if Leviathan had decided that donative promisors were excused from performing in cases of donee assault on the donor, donee libel of the donor, the donor's financial reverses, the donee's ingratitude, destruction of the donor's property by the donee, etc., Leviathan would still have to decide how to respond to an entirely new type of interaction, e.g., if the donee simply refused to communicate with the donor for several months.

So interpreted, the moderate thesis sounds plausible, at least initially. Friendships and family relationships are indeed complex, and the moral implications of various possible interactions are quite fact-dependent. However, it does not follow that we should provide no remedy at all for the breach of a simple donative promise. It may mean that an action for breach of such a promise must be subject to at least one defense that is expressed as a *standard* rather than a *rule*, but there is nothing remarkable or unusual about that.[160] Contract law as a whole is full of norms expressed as standards rather than rules. One could borrow language from the unforeseen circumstances exception to the pre-existing duty rule and refer to "circumstances not anticipated by the parties at the time of the promise that make performance substantially more onerous."[161] Alternatively, if it is not deemed necessary that the circumstances be unforeseen, one could use language like the "material adverse change of circumstances" clauses that appears in acquisition agreements. At an even greater level of generality, one could use language analogous to that of section 90 and authorize a court to refuse enforcement or limit remedies "as justice requires."[162] I do not now wish to argue that any *one* of these formulae could capture the range of excuses to which simple donative promises should be subject. I am more inclined to believe that a group of them would be required. My present point, however, is that our inability to predict comprehensively and in advance all the facts that might conceivably generate an excuse is not an insuperable obstacle to an enforcement regime with appropriate defenses. List-making is not the only form of lawmaking.

In the end, therefore, Professor Eisenberg's second substantive reason for refusing to enforce donative promises proves to be inadequate. If he is relying on the strong thesis as his premise, the premise itself is doubtful. If he is relying on the moderate thesis, the premise is more plausible, but it does not entail his conclusion that donative promises should not be enforced. I turn now to the very different argument in support of that conclusion developed by Professor Markovits.

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160. Indeed, the mother of all standards, the unconscionability defense to a contract, is responsive to precisely the same sort of problem. It is impossible to specify in advance all the forms that bargaining unfairness and economic overreaching may take, at least if we try to use the simple, empirically verifiable descriptions characteristic of rules. Nevertheless, leaving such forms of bad conduct entirely unregulated is not our only option. The use of an admittedly vague standard permits judicial oversight with sufficient flexibility to permit legal evolution.

161. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS: MODIFICATION OF EXECUTORY CONTRACT § 89(a) (1981) ("A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made.").

162. RESTATEMENT (SECOND) OF CONTRACTS: PROMISE REASONABLY INDUCING ACTION OR FORBEARANCE § 90(1) (1981) ("The remedy granted for breach may be limited as justice requires.").

II. PROFESSOR MARKOVITS ON COLLABORATION

A. Professor Markovits's Argument

1. The Scope of the Argument.—In contrast to Professor Eisenberg's article, the question whether simple, affective donative promises should be enforced is not the principal focus of Professor Markovits's article. Indeed, one should observe at the outset that Professor Markovits's article is a remarkably ambitious one. It purports to be a moral and philosophical theory of promising that not only accounts for the commonly experienced features of promising in practice, but also explains the moral desirability of promising as an institution and the moral obligation to keep particular promises.

The theory traces its roots to Kant's third formulation of the categorical imperative, but it does not purport to be utterly faithful to, or a simple exegesis of, Kant.[163] Rather, it purports to be a further articulation of, and an advancement beyond, strictly Kantian ideals.[164] Along the way, Professor Markovits claims to resolve traditional philosophical puzzles concerning promising, including: the reasons why we do not have a duty to *make* any particular promise,[165] the reasons why keeping promises appears to be a stronger obligation than making them in the first place,[166] why an act of will should be sufficient to generate a moral obligation,[167] why promises change the logical structure of our practical reasoning,[168] and why a promise should bind the promisor morally even in the absence of reliance by the promisee.[169] He then refines the general moral theory of contract to articulate the more particular form of moral ideal—collaboration—that explains the desirability of contracting and the obligation to perform one's contracts.[170] This is all very heady stuff, and the project is carried out at a fairly high level of abstraction. It is only toward the end of the article that Professor Markovits, in an effort to show that his theory fits well with the institution of contract he is trying to explain and justify, contends that it explains and justifies the traditional doctrine of consideration.[171]

My focus in this Article on Professor Markovits's contentions concerning the doctrine of consideration is thus a concentration on matters that, for him, are undoubtedly subsidiary points. Moreover, his defense of the doctrine of consideration is engaged and disputed here without mounting a broad refutation of his overall account of promising and contract. Indeed, a thorough evaluation of his philosophical model of promising and contract would require an article of

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163. Markovits, *supra* note 2, at 1424.
164. *Id.*
165. *Id.* at 1435-38.
166. *Id.* at 1438-41.
167. *Id.* at 1442-46.
168. *Id.* at 1440-41.
169. *Id.* at 1439, 1443-46.
170. *Id.* at 1446-74.
171. *Id.* at 1474-91.

far greater length than I am prepared to write and far more philosophical training and experience than I have. Accordingly, although I have (and will occasionally articulate) some reservations about it, I propose to assume that his general theory of promising is largely accurate and illuminating. What I propose to dispute is that the traditional requirement of consideration follows from that theory.

2. Promissory Obligation.—It is necessary to begin by articulating in more detail Professor Markovits's theory of the moral obligation that arises from a promise. The foundation of the theory is Kant's fundamental moral principle, the categorical imperative, and, in particular, the version of the principle called the "Formula of the End in Itself."[172] That principle is, "'Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.'"[173] The principle is, in Professor Markovits's view, not one command, but two.[174] First, one should never use persons merely as a means; second, one should always treat them as ends in themselves.[175] He asserts this pair of commands expresses a moral ideal of respectful community that ultimately will prove to be the moral foundation for promising and contract.[176]

Initially, the dual commands embodied in the "Formula of the End Itself" explain why it is wrong to lie and, in particular, why it is wrong to engage in the form of promise-breaking that is a subset of lying.[177] The false promise, as opposed to the honest but broken one, is a promise that the promisor never intends to keep, even at the moment it is made. For example, suppose a person borrows money that he knows he will be unable to repay (and intends never to repay), but promises to repay within a fixed span of time.[178] The lying promise violates the first command because it treats the promisee as a mere means.[179] The promisee cannot accept the promisor's ends, as she has not been invited to, but has instead been deliberately kept in the dark and manipulated.[180] She is an object of the promisor's plan—not a participant.[181] However, even if the promisee is not deceived, and is both aware of the promisor's deceptive intent and quite willing to give him the money outright, the promisor has failed to treat

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172. *Id.* at 1424.

173. *Id.* (quoting IMMANUEL KANT, GROUNDWORK OF THE METAPHYSIC OF MORALS 429 (H.J. Paton trans., Harper & Row 1964) (1785)).

174. *Id.*

175. *Id.* The first command prohibits actions according to "maxims" that those affected could not accept and thus treating them merely as things, not as persons. *Id.* at 1425. The second command prohibits actions in pursuit of ends that the persons affected could not share. *Id.* The relation between persons that results from violation of the "Formula of the End in Itself" is estrangement, the opposite of respectful community. *Id.* at 1426.

176. *Id.* at 1420, 1424.

177. *Id.* at 1424-28.

178. *Id.* at 1426.

179. *Id.* at 1427.

180. *Id.*

181. *Id.*

the promisee as an end.[182] The promisee may have avoided being treated merely as a means because she has not been deceived.[183] Nevertheless, even if her end and that of the promisor *coincide*, they are not *shared*.[184] Her acquiescence in his receipt and retention of the money does not generate a relation of respectful community.[185] The lie prevents the sharing of ends that a community requires.[186]

It is probably safe to assume, however, that most ordinary promise-breaking involves breaking honest promises, in the sense that the breaching promisor honestly intended to keep the promise when he made it. Further articulation of the theory of promising is therefore necessary, and Professor Markovits supplies it. The honest promisor who breaches does not deceive or coerce the promisee and thus does not treat her merely as a means to his own ends.[187] Such a promisor does, however, violate the second command of the "Formula of the End in Itself."[188] Specifically, he fails to treat the promisee as an end in herself by pursuing an end she cannot share.[189] The result is one of several possible forms of estrangement.[190]

Why is breaking an honestly-made promise a failure to treat the promisee as an end in herself? The answer begins with a more complete analysis of the notion of promise-*making*.[191] When a person makes a promise, he adopts an end or ends that are specified in the content of the promise.[192] Those ends are available to the promisee, and she normally adopts them as well.[193] However, further features of the promise make the overlap of ends more than merely coincidental.[194] The promisor also intends to "entrench" the ends specified by the promise and refuse to defect from the ends unless released from them by the

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182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 1427-28.

186. *Id.* at 1428. In a further elaboration of the ideal of respectful community generated by the "Formula of the End in Itself," Professor Markovits later specifies two components of the ideal. "First, the basis of respectful community must be free," in the sense that the parties to the community must enter it willingly. *Id.* at 1429. This is not possible if one party manipulates the other through deception or coercion, which amounts to treating the other as a means. *Id.* at 1429-30. Treating another as a means thus generates one form of estrangement. *Id.* "Second, the basis of respectful community must be shared," in the sense that the participants must pursue ends they adopt together. *Id.* at 1429. A second form of estrangement thus arises if one pursues ends in which the other, though implicated in them, cannot participate. *Id.* at 1429-30.

187. *Id.* at 1431.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 1431-33.

192. *Id.* at 1431-32.

193. *Id.* at 1431.

194. *Id.* at 1432.

promisee.[195] The promisor gives the promisee authority over his ends and subordinates his own ends to her will.[196] The sharing of ends in this very strong sense creates the relation of respectful community between promisor and promisee.[197]

If the promisor then breaks the honest promise, he abandons the ends specified by the promise and adopts ends that, with respect to the promised performance, are inconsistent with those of the promisee.[198] In so doing, the promisor does something far worse than merely abandoning the community the promise had created and returning to the status of a stranger to the promisee.[199] The breach of promise, by its adoption of ends contradictory to those of the (formerly shared) ends of the promise, is a *betrayal* of the community initially created by the promise.[200] It puts the promisor and promisee in a relationship of estrangement or enmity.[201] Such estrangement is the evil that makes breaking even an honestly-made promise wrong.[202]

3. Collaboration and Contractual Obligation.—The justification of the institution of contract, and for keeping the contracts one makes, takes the analysis a step further in specificity. Contracts are, among other things, a subset of the broader category of promises,[203] and so we may expect Professor Markovits to find the moral foundation for contract in the ideal of respectful community entailed by the "Formula of the End in Itself." He fulfills that expectation by defining a particular kind of respectful community he calls "collaboration" and arguing that this more particular ideal explains and justifies contract as a specific variety of promising.[204]

Like many of the concepts Professor Markovits uses, the notion of collaboration is a complex one, and he constructs it in stages. Initially, collaboration is a form of "joint intentional activity."[205] To describe coordinated activity as "joint intentional activity" entails at least the following elements:

(a) the parties intend to engage in coordinated action;[206]

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195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 1433.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1448.

204. *Id.* at 1448-51.

205. *Id.* at 1452-56. Professor Markovits borrows the term and much of its analysis from philosopher Michael Bratman. *Id.* at 1451 n.70 (citing MICHAEL E. BRATMAN, SHARED COOPERATIVE ACTIVITY IN FACES OF INTENTION: SELECTED ESSAYS ON INTENTION AND AGENCY 93 (1999)).

206. *Id.* at 1452. Coordinated action, as opposed to merely correlated action, requires that the actions in question not be coincidental, but rather that each party's actions "'have a reference to'" the other's. *Id.* (quoting DAVID HUME, *Of Morals*, *in* A TREATISE OF HUMAN NATURE 455, 490

(b) the parties "specifically intend to perform the actions according to meshing subplans";[207]
(c) the parties intend to act, and actually act, in mutually responsive ways, so that each participant adjusts his or her subplans and actions to those of the others;[208] and
(d) the intentions reflected in (a)-(c) "be common knowledge among the participants."[209]

The performance of a contract, according to Professor Markovits, characteristically involves just such joint intentional activity,[210] although an explanation of the institution of contract in terms of joint intentional activity alone is essentially incomplete.[211] Joint intentional activity requires only that each participant have intentions in favor of the *activity*, not intentions in favor of the other *participants*.[212] In order to obtain a satisfactory account of contract, it seems we must add the element of *promise* and the implications of the earlier analysis of that practice.[213] Specifically, a contractual promisor, in addition to having the intentions just mentioned, intends not to abandon the promised performance (and so defect from the joint intentional activity) unless released by the promisee.[214] In harboring this intent not to be the first to defect, the promisor grants the promisee authority over the promisor's intentions and will (or, looking at it another way, subordinates his own ends to those of the promisee).[215] The promisor thus treats the promisee as an end in herself, and this creates a morally

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(Oxford Univ. Press 2d ed. 1978) (1739-40)).

207. *Id.* at 1453.

208. *Id.* at 1453-54. Mutually responsive activity is distinguished from prepackaged coordination, which involves joint planning but separate action. *Id.* The latter can succeed, in the absence of mutual responsiveness, only if the meshing subplans are complete at the outset and every possible detail is specified and every possible contingency is anticipated. *Id.* at 1454.

209. *Id.* at 1455. This means that the intentions of the participants are interlocking. *Id.* Each agent treats the "intentions of the other . . . as end-providing for herself," in that each intends that the relevant intentions of the other succeed. *Id.* (quoting BRATMAN, *supra* note 205, at 93). However, joint intentional activity need not contain the further elements necessary for "shared cooperative activity." *Id.* The latter requires that each participant have the additional intention that, in at least one circumstance in which one participant requires help to perform the joint task, the other participant is willing to help without the first participant offering any further inducement for the requisite assistance. *Id.*

210. *Id.* at 1456-57. Despite this claim, Professor Markovits emphasizes that parties to contracts need not be committed to shared cooperative activity, i.e., to mutual uncompensated support. *Id.* at 1457. Each party to a contract commits not to be the first to defect from the joint intentional activity. *Id.* at 1458. However, though he may do so, he need not commit to compensating for the other party's shortcomings. *Id.* at 1457-58.

211. *Id.* at 1458.

212. *Id.* at 1460.

213. *Id.* at 1458-63.

214. *Id.* at 1460.

215. *Id.* at 1460-61.

valuable relationship of respectful community.[216] In contrast, a promisor's breach of the contract treats the promisee as something other than an end in herself, destroys the community, and results in estrangement.[217]

Professor Markovits calls the relationship of respectful community characteristic of contract "collaboration," and he is careful to distinguish it from the more supportive relationship of "cooperation."[218] The latter relationship implies patterns of "reciprocal concern" and "mutual aid" that *may* be present in contractual relationships, but are by no means *essential* to contract.[219] On the contrary, the parties to contracts may pursue their own interests quite selfishly, even in the context of the contract.[220] "Collaboration" requires only that the parties each agree not to be the first to defect from the joint project defined by the terms of the contract.[221] Nevertheless, even this thinner relationship of collaboration is a form of respectful community,[222] and both making and keeping one's contracts are justified by appeal to it.

4. Consideration.—Now that the central features of Professor Markovits's moral theory of contract have been outlined, the remaining expository task is to explain his view that this theory supports certain features of the traditional doctrine of consideration. In his view, the central task for a contract theorist seeking to explain the doctrine of consideration is to explain two aspects of it that appear to be in tension.[223] Contract law traditionally requires, as a condition of enforcement, the fact of bargain—i.e., that each party to the contract provides or promises something in exchange for the other's promise or performance and that each side's promise or performance induces the other's.[224] Yet contract law is largely indifferent to the fairness or adequacy of the bargain.[225] In effect, the scholar's task is to explain why the fact of bargain is so important that the law insists on it, while the specific terms and fairness of the bargain are so unimportant that they may be ignored in all but exceptional cases.

Professor Markovits contends that his analysis of contract in terms of the collaborative ideal explains and justifies both aspects of the doctrine of consideration.[226] Actual bargains are illustrations of joint intentional activity that

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216. *Id.* at 1463.

217. *Id.*

218. *Id.* at 1460-62.

219. *Id.* at 1462.

220. *Id.* at 1461. Professor Markovits recognizes that there are forms of contracts that generate even stronger bonds of community, and he gives as examples contracts that create fiduciary duties among partners or joint venturers, as well as "relational contracts" among regular suppliers. *Id.* at 1449-50 & n.68 (citing IAN R. MACNEIL, THE NEW SOCIAL CONTRACT 10 (1980)). However, he insists that the discrete self-interested contract is the conceptually primary one. *Id.*

221. *Id.* at 1460-61.

222. *Id.* at 1461.

223. *Id.* at 1477.

224. *Id.* at 1477-78.

225. *Id.*

226. *Id.* at 1481-87.

involve collaboration as a form of respectful community.[227] In the ordinary bargain, each party, by virtue of his own promise, subjects his own intentions to that of the other, grants her authority over them, and thus treats her as an end in herself.[228] A bargain is thus an instance of the establishment of a morally valuable relationship of respectful community between the parties.[229] Moreover, because collaboration is a "thinner" ideal than "cooperation," the bargain *form* alone creates this form of community, as long as it is a real bargain.[230] *What* the parties to a bargain promise each other is (or may be) a matter of indifference. Collaboration arises from the mere fact that each grants the other authority over her ends as specified in the respective promises.[231] The nature of those ends and the content of each party's promise are irrelevant, in the sense that we may conclude a valuable relationship has arisen from the fact of bargain, without knowing what the terms of the bargain are.[232]

B. Criticism

1. Refining the Scope of the Defense.—If one accepts Professor Markovits's general theory of the value of collaboration, as well as the premise (implicit throughout his article) that the moral value of a relationship created by promising (or, for that matter, some other action) could justify the imposition of legal sanctions, then one might conclude that he has provided some justification for the doctrine of consideration—up to a point. It should be recalled that the "doctrine" of consideration is not one rule, but a cluster of several related rules.[233] If one

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227. *Id.* at 1482-83.

228. *Id.* at 1483.

229. *Id.* at 1482.

230. *Id.* at 1483.

231. *Id.*

232. At this point, a fairly obvious objection comes to mind. Everyone knows that there are a lot of morally bad bargains in the world. Some of them are bad because the assent of one party is obtained by fraud, duress, or some other improper means. These pose no difficulty for Professor Markovits's theory, as they do not even generate collaborative relationships, in his sense. A person who obtains the assent of another to a bargain through force or fraud not only fails to treat the other as an end in herself, but actually uses her as a mere means. There are, however, other bad bargains that do not fall into this category. The mutual promises of a group of bank robbers or between a drug dealer and his own supplier form genuine bargains, but the transactions in question are universally regarded as morally vile. The total independence of the valuable relationship (collaboration) from the substantive terms of a bargain may thus be doubted. One assumes that Professor Markovits could respond to this objection by agreeing that collaboration arises in such cases, but denying that collaboration is the only morally relevant feature of the transaction. He never asserts that collaboration is the only relevant moral value, and it is thus open to him to conclude that, in such transactions, other moral values outweigh whatever minimal value the collaborative relationship between robbers or drug dealers may have.

233. *See* Wessman, *Gatekeeper I*, *supra* note 3, at 49-50; Wessman, *Gatekeeper II*, *supra* note 3, at 713-14.

accepts Markovits's premises, he has so far justified, at most, two of them: (a) the rule that the fact of bargain is *prima facie* a *sufficient* reason to enforce the constituent promises of the bargain; and (b) the rule that, absent exceptional circumstances, the courts do not inquire into the adequacy of consideration (i.e., the underlying fairness of the bargain). However, what has been said so far does not justify the traditional rule in which I am most interested, the rule that the fact of bargain (or some substitute for it) is a *necessary* condition of promissory enforcement, i.e., the rule that gratuitous promises should not be enforced. In other words, showing that the ideal of collaboration makes bargains valuable enough to merit enforcement does not establish that *only* bargains are valuable enough to justify legal sanctions.

It is clear, however, that Professor Markovits accepts at least a weak version of the latter claim, although like Professor Eisenberg, he does not wish to defend the claim that all promises traditionally classified as gratuitous should be unenforceable. Requirements, output, and best efforts contracts, for example, have sometimes run afoul of the consideration requirement, and one-sided modifications of bargains have often run afoul of the pre-existing duty rule.[234] Yet Professor Markovits regards them as promises that can support collaborative relations and so regards them as proper exceptions to the requirement of consideration.[235] The bargain form is thus a proxy for the presence of collaboration, although an imperfect one.[236] He also suggests that promises enforceable on the basis of promissory estoppel might be similarly justified, although he insists that such promises be classified as *noncontractual* collaborative arrangements.[237]

Although the contours of the consideration requirement he wishes to defend are not entirely clear, it appears that Professor Markovits's primary candidate for the quintessentially unenforceable promise is what Professor Eisenberg would call the simple donative promise, although Professor Markovits refers at various times to "personal" promises, promises motivated by "benevolence," and "donative" promises.[238] Why should such promises be denied enforcement? The general answer seems to be that such promises involve *passive* promisees, and passive promisees make collaboration impossible.[239]

2. The Problem of the Passive Promisee.—At this point, however, the argument becomes a bit murky. There are two obvious questions in need of answers: (a) What precisely is a "passive promisee"? and (b) Why does the presence of a passive promisee destroy any prospect for collaboration? The answers to these questions appear to vary somewhat at different points in Professor Markovits's paper. At one point, he describes the passive promisee as

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234. Markovits, *supra* note 2, at 1488-89.

235. *Id.*

236. *Id.* at 1488, 1491.

237. *Id.* at 1488 n.168.

238. *Id.* at 1486-87, 1490.

239. *Id.*

"a promisee who simply waits for the promisor unilaterally to make her gift."[240] At another, he describes the passive promisee as one "who does not exercise her ownership of the promissory obligation, who remains disengaged from the promise and does not interfere in the promised performance, either to command or to release it."[241] Collaboration requires that a promisor intend to give the promisee authority over his own intentions and ends and, apparently, that the promisee *exercise* that authority.[242] Absent the promisee's exercise of the authority granted by the promisor, not only has the promisee not "engaged" the promisor, but the promisor cannot "engage" the promisee and treat her as an end in herself.[243]

Initially, it is not entirely clear why mere inaction by the *promisee* should prevent a *promisor* from treating the promisee as an end in herself.[244] Whatever the explanation, however, one's most immediate intuitive reaction is that Professor Markovits's "passive promisees" are so utterly passive that there cannot be very many of them in the real world. Calling them "catatonic promisees" might have been more accurate. Indeed, it appears that all a donative promisee must do to avoid becoming a passive promisee is exhort the promisor to perform and, if the promisor appears ready to renege, insist firmly on performance.[245] If so, Professor Markovits's defense of the requirement of consideration reduces to something of a caricature. It is as if we are being told that a donative promise should not be enforced—unless of course, the promisee wants it enforced. The promisee's exhortation or insistence prevents her from being passive, establishes collaboration, and justifies enforcement. To put it another way, enforcement of donative promises would be justified precisely in all those cases in which it was sought, and the "requirement" of consideration would only be a true requirement if the donative promisee did not object to it.

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240. *Id.* at 1489-90.

241. *Id.* at 1486.

242. This seems implicit in Professor Markovits's reference, at one point, to the "promisee's management of the promise." *Id.*

243. *Id.*

244. I will simply note in passing that I cannot see how Professor Markovits's last conclusion follows from his earlier, more general theoretical account of the value of promising and keeping one's promises. The earlier account suggests that the promisor treats the promisee as an end in herself simply by *keeping* the promise made to her. While it is perhaps intelligible why an utterly passive promisee may fail to treat the promisor as an end in herself, that does not explain why or how she also keeps the *promisor* from treating the promisee herself as an end. How a passive promisee prevents the promisor from treating the passive promisee as an end in herself thus remains mysterious. However, because I find this notion of a passive promisee so odd, I do not dwell on this point.

245. This interpretation of what it means to be, or avoid being, a passive promisee is suggested by Professor Markovits's characterization of the passive promisee as one who neither "commands nor releases" the promised performance, and by his claim that bargains are distinguished from "passive" transactions by the fact that each party to a bargain intends to "actively insist" on performance when it is due. Markovits, *supra* note 2, at 1486-87.

Since it is doubtful that Professor Markovits intended to defend such a pale ghost of the traditional common law requirement of consideration, one must assume that he believes that a promisee, in order to avoid the status of passive promisee, must do something more than simply exhort or insist upon performance. Indeed, this is suggested by his insistence that the promisee's mere *acceptance* of a promise cannot be sufficient to establish collaboration.[246] One may ask, however, what else is required, and why does its absence preclude collaboration (in the morally valuable sense)? Professor Markovits does not, as far as I can tell, provide an answer.

3. A Potential Reconstruction: Joint Intentional Activity.—One may *construct* a possible answer out of materials he provides, although I hesitate to attribute it to him, as it ultimately begs the question. If one returns to one of the building blocks of Professor Markovits's account of contract—specifically the notion of joint intentional activity—one is struck by the examples of such activity he uses. He refers specifically to a couple taking a walk together, two people rowing a boat together, and two musicians singing a duet together,[247] and the last of these examples is the one that recurs the most often.[248] They are all examples in which both of the participants in a joint endeavor are "active" in a strong sense of the word. Each participant must exert physical effort in a performance involving physical motion. Perhaps Professor Markovits intends to confine the notion of "joint intentional activity" to these sorts of active examples and to define "contract" in terms of agreements for joint intentional activity in this restricted sense.[249] If one adopts such a set of definitions, of course, a requirement of bargained consideration seems to be a logical consequence. Any agreement in which two people agree that each of them will render this kind of active physical performance will qualify as an agreement for an *exchange* of performances, and we have thus built the notion of exchange into the very definition of "contract" (via the definition of "joint intentional activity"). Donative promises will be excluded by definition, and only exchange promises can possibly qualify.[250]

However, by simply adopting such definitions arbitrarily, we have not really accomplished anything or illuminated theoretical questions of contract law. The decision to define "joint intentional activity" in terms of dual active physical

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246. *Id.* at 1487 n.167.

247. *Id.* at 1452.

248. *Id.* at 1452-55.

249. The possibility that Professor Markovits may be adopting this strategy (and I emphasize the word "may") is suggested by his statement: "The special relation whose value underlies the morality of contract therefore cannot possibly be constructed out of a contractual promisor's participation standing alone, but must instead look to the promisee's *activities* as well." *Id.* at 1487 (emphasis added).

250. Indeed, on the plausible assumption that Professor Markovits's definition of "joint intentional activity" implies that the activities and intentions of each party *induce* those of the other, only bargain promises will qualify for enforcement. Exchange and mutual inducement are the defining features of a bargain.

performances seems arbitrary. One suspects that the average speaker of the English language would regard two people watching television together as engaged in joint intentional activity, as long as it was not accidental that they did so. The same is presumably true of one person sitting and listening to the other play the tuba.

Moreover, even if one decides to adopt such a strong or "activist" definition of "joint intentional activity" for general purposes, it seems equally arbitrary (and question-begging) to decide at the outset that contract is to be defined as "joint intentional activity" in this rather strong sense. To be sure, one can thereby define contract in a way that entails a requirement of consideration and disqualifies donative promises from enforcement. But arriving at the latter conclusion by smuggling it in with a restrictive set of definitions that itself has nothing obvious or independent to recommend it would seem to beg the *normative* question of whether donative promises should be enforced. If we simply *define* contract as bargain, the more interesting normative question just reappears as the question of why promissory liability should be confined to "contract" in the arbitrarily defined sense. Conquest by definition does not amount to justification.[251]

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251. Indeed, there are a number of features of Professor Markovits's article that suggest he is ultimately constructing a technical, philosophical model of contract that, whatever its other merits, is far from coextensive with the notion of contract employed by most practitioners and scholars of contract law. For example, his account of promising and contract is founded on the morality of relations between individuals, and he concedes that it does not apply to contracts among business organizations (or between individuals and such organizations) "in any straightforward way." Markovits, *supra* note 2, at 1464. However, he insists that contracts formed by promises between individuals constitute the "essence" or "conceptual core" of contract, and he appears to accept the conclusion that contracts between business organizations must have some other form of justification. *Id.* at 1464-67. Contracts between corporations, however frequent they may be, thus become derivative cases. Similarly, although Professor Markovits clearly recognizes the existence (and perhaps the frequency) of relational contracts, they are likewise removed from contract's conceptual core, which consists of the discrete, self-interested exchange. *Id.* at 1449-50. Finally, although he appears to have no quarrel with enforcing promises on the basis of promissory estoppel, he suggests reliance-based liability must be understood as a form of *noncontractual* obligation. *Id.* at 1488 n.168. Apparently, the essence of contract is the proverbial one-time sale of gasoline to a through traveler on the New Jersey Turnpike. It is, of course, open to Professor Markovits to define "contract," for purposes of his article, in any way he likes. However, three points must be emphasized. First, the more his notion of "contract" becomes a technical term by excluding or marginalizing cases that contract lawyers and scholars regard as rather ordinary contracts, the less satisfactory it becomes as a *general* theoretical explanation of contract. Second, to the extent his use of the word "contract" is a technical one, it prompts the question of why liability on promises should be confined to cases encompassed by his technical sense of "contract." Third, even if one accepts his view that the discrete, self-interested exchange is the "conceptual core" of contract, in the sense that it is the simplest or "plain vanilla" example of a contract, it does not follow that promise-based liability, or even contract liability proper, should be exhausted by or confined to the plain vanilla cases. There are a lot more flavors than vanilla. Some of them may even be better.

4. A Closer Look at Collaboration and Benevolence: The Moral Value of Donative Promises.—

a. The value of benevolence.—Thus, even if one assumes that Professor Markovits's collaborative ideal provides a satisfactory explanation and justification for enforcing bargain promises, he has not provided either a satisfactory elaboration of what it means to be a "passive promisee" or an explanation for the claim that donative promisors and promisees cannot (or do not) collaborate. He has therefore not yet explained why enforcement should be granted in the case of bargain promises and withheld in the case of donative promises.

Indeed, at one point, he seems to concede that donative promisors and promisees can and do collaborate, at least sometimes.[252] Specifically, in the case of "personal promises,"[253] the promisor is motivated to promote the promisee's interests, and "this benevolence may . . . underwrite the respectful relation upon which promissory morality depends."[254] The "promisee's interests may assert themselves even without the promisee's active participation," as the promisor's benevolence operates as "a stand in for the promisee's management of the promise."[255] The content of the concept of benevolence employed at this point is not articulated in any detail,[256] but it appears that a benevolent promisor, by making and keeping a promise, either engages in actual collaboration with the promisee or else creates some equally valuable form of respectful community.[257]

b. The argument based on indifference to motive.—Does it follow that some or all "personal promises" should be enforced? Professor Markovits never quite says so. He does suggest that the modern trend toward enforcement of charitable subscriptions and marriage settlements, even without proof of consideration or reliance,[258] may be accommodated to his collaborative view of contract by reading into the law a presumption that charitable subscriptions are benevolently motivated.[259] He regards such a presumption, however, as "ideological and

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252. *See id.* at 1486.

253. Professor Markovits does not define the term "personal promise," but it is probably safe to assume he intends it to refer to promises between family members, intimates, friends, or other close associates.

254. Markovits, *supra* note 2, at 1486.

255. *Id.*

256. This is not intended as a criticism of Professor Markovits. The lack of detail is deliberate (presumably because benevolent promises are only of secondary interest to him), and he suggests that an account of personal promises based on benevolence could be developed by articulating the form of benevolence at issue and distinguishing it from false or depraved variations. *Id.* at 1486 n.166.

257. *Id.* at 1486.

258. RESTATEMENT (SECOND) OF CONTRACTS: PROMISE REASONABLY INDUCING ACTION OR FORBEARANCE § 90(2) (1981).

259. Markovits, *supra* note 2, at 1490 n.173. My own views on charitable subscriptions are closer to Professor Eisenberg's than Professor Markovits's. In my view, the reasons such promises should be enforced have less to do with the benevolence that may (or may not) motivate them than

absurd,"[260] and he regards the suspicion with which the common law views donative promises as justified.[261] Moreover, he suggests, at one point, the fact that benevolent promises may generate collaboration will not support enforcement of promises generally "[b]ecause the law declines to inquire into a promisor's motives."[262]

The last suggestion, in my view, is a non sequitur, for two reasons. First, in referring to the law's alleged indifference to the promisor's motives, Professor Markovits is presumably appealing to part of his previous description of the peculiarity of the requirement of consideration. The doctrine of consideration requires that each party to a contract manifest an intention to induce, and be induced by, the other party's return promise or performance.[263] The reference to inducement might tempt us to conclude that consideration doctrine not only concerns motivation, but makes it central. However, following Holmes, Professor Markovits identifies the requisite inducement as "'reciprocal *conventional* inducement.'"[264] The law focuses on the *manifestation* of intention to induce or be induced and does not require that the bargained-for consideration be the sole, actual motive for the promise at issue.[265] The distinction is a familiar, if somewhat slippery, one. However, if it is tenable to draw a distinction between actual and manifested motive or intention in the case of the doctrine of consideration, there is no reason the same distinction could not be drawn in the case of whatever class of donative promises we choose to enforce. Assuming there are normative reasons to enforce donative promises (like the presence of benevolence), we could enforce promises that reflect a *manifested* intention of benevolence, and spare the courts the evidentiary burden of ascertaining the promisor's "true" motive, just as we do in the case of bargains.

More fundamentally, however, even if it is true that indifference to motive is one aspect of the doctrine of consideration, that provides no support for refusing to enforce benevolent promises if (a) benevolent promises generate collaboration (or some equivalent form of respectful community); and (b) the moral value of a relationship engendered by a promise is or may be a sufficient

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the fact that, in the United States, much good (including much that is done by government in other societies) is accomplished by charitable organizations. Moreover, even if it is not always or often possible to prove specific reliance by a charity on an individual promise, charitable organizations rely in a general way on the stream of income generated by pledges collectively.

260. *Id.*

261. *Id.* at 1489.

262. *Id.* at 1490 n.173.

263. *Id.* at 1477 (citing RESTATEMENT (SECOND) OF CONTRACTS: REQUIREMENT OF EXCHANGE; TYPES OF EXCHANGE § 71 (1981)); *id.* at 1483 (citing RESTATEMENT (SECOND) OF CONTRACTS: CONSIDERATION AS MOTIVE OR INDUCING CAUSE § 81 cmt. a (1981)).

264. *Id.* at 1477 (emphasis added) (quoting OLIVER WENDELL HOLMES, JR., THE COMMON LAW 293-94 (Dover Publications, Inc. 1991) (1881)).

265. *Id.* at 1477, 1483, 1490; *see also* RESTATEMENT (SECOND) OF CONTRACTS: CONSIDERATION AS MOTIVE OR INDUCING CAUSE § 81 (1981).

reason to enforce it.[266] Whether the doctrine of consideration should continue to pose an obstacle to the enforcement of donative promises is *precisely what is at issue*. If propositions (a) and (b) are true, there is reason to enforce donative promises, and the doctrine of consideration, including its apparent indifference to motive, can be jettisoned if it gets in the way.

c. Benevolence, cooperation, and comparing distinct moral ideals in deontological theory.—The last observation leads quite naturally to my most fundamental objection to Professor Markovits's claim that his Kantian account of promising and contract vindicates the requirement of consideration, at least insofar as the latter prohibits enforcing donative promises. Keeping the promises one makes is, in his view, morally valuable because the promise-keeper treats the promisee as an end in herself and thus enters a relationship of respectful community with the promisee.[267] Moreover, the general account of promising suggests that this is true even if the promissory relationship is one-sided, i.e., if the promisee makes no return promise. Bargains, of course, are morally valuable because they are reciprocal promissory arrangements in which each side treats the other as an end and so creates the more specialized relationship of community called "collaboration."[268] The obvious question, however, is why collaboration is regarded as better than one-sided respectful community or as so much better that legal sanctions should attach to the former, but not the latter?[269] In my view, Professor Markovits never provides an answer to this question, and so never provides a justification for drawing the boundary of legal enforcement where the doctrine of consideration does.

At this point, Professor Markovits (or the reader) might be tempted to respond to my question as follows:

> Are you stupid, or just confused? If two parties are collaborating in a bargain relationship, each is treating the other as an end, as the "Formula of the End in Itself" requires. In the one-sided promissory relationship characteristic of donative promises, only one party is treating another as an end. The former is obviously better than the latter, for the simple reason that two is a larger number than one. *Quod erat demonstrandum.*

In spite of its intuitive appeal, however, it seems to me that this is precisely the sort of argument that one pursuing the very ambitious project set out by Professor Markovits may not make. Recall that Professor Markovits purports to be providing a Kantian, deontological theory of promising and contract. He

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266. Professor Markovits admits (a). Markovits, *supra* note 2, at 1486. He seems committed to (b) by his justification of enforcing bargains by appeal to the value of collaboration. *Id.* at 1458-63.

267. *Id.* at 1431-35.

268. *Id.* at 1458-63.

269. At least, the question is obvious to those of us who, in contrast to Professor Markovits, are primarily interested in the implications of his theory for the requirement of consideration and the enforcement of donative promises.

disclaims any intent to base the moral or legal obligation to keep promises on reliance, harm, or welfare.[270] He specifically adopts the view that promises change our reasons for action in ways that may prevent the overall balance of utility from being decisive in a particular instance.[271] For someone who starts from such premises, comparative assessments of moral value cannot simply be matters of "bean counting," as the argument of the previous paragraph suggests. The question whether it is better that one party treat another as an end in herself, or that two do so reciprocally, cannot be dismissed as nonsensical at the outset.

To illustrate the point, it might be helpful to consider an example. I think we may all agree that Bill Gates has accomplished a great deal in his life thus far. He amassed the world's greatest fortune largely by living in the "world of contract." He created operating systems and software that generated massive sales to hardware suppliers and the public at large.[272] He now also is rather prominent in the "world of gift." He is giving away a lot of money (and/or pledging to give it away).[273] Some of his pledges are promises to provide money for research on and/or delivery of drugs and vaccines for the disease-ravaged populations of third-world countries.[274] Assuming the resulting research proves successful in the long run, we could ask whether it was and is morally better for him to make (and keep) his bargain promises or his donative promises.

It is fairly obvious, in principle, how the classical utilitarians or their modern cousins, the law and economics scholars, would go about answering the question. The inquiry is essentially quantitative, at least theoretically. One would

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270. He does not, of course, deny that considerations of reliance, harm, or utility can generate moral or legal obligations. *See* Markovits, *supra* note 2, at 1419. He does, however, deny that such considerations explain what is distinctive about promising in general and contracting in particular. *Id.* at 1419-20.

271. *Id.* at 1440.

272. *Bill's Billions: Microsoft's Dividend*, ECONOMIST, July 24, 2004, at Leader; David Gelernter, *Software Strongman*, TIME, Dec. 7, 1998, at 200; *Microsoft: Peaks, Valleys and Vistas*, ECONOMIST, Jan. 20, 2007, at 2.

273. I am obviously ignoring the fact that much of Gates's wealth was generated by a legally distinct entity (Microsoft, the corporation) and that many of "his" donations and donative promises are actually those of an equally legally distinct foundation. I disregard the legally distinct entities because I am reasonably confident he has actual control of both the corporation and the foundation, and nothing much turns on it for present purposes.

274. Amanda Bower, *Bill & Melinda Gates: Giving Money and Hope to the World*, TIME (SPECIAL ISSUE), May 8, 2006, at 63; Warren E. Buffet, *Bill Gates: Billionaire Philanthropist*, TIME, Apr. 26, 2004, at 60; Kerry Capell, *GlaxoSmithKline: Getting AIDS Drugs to More Sick People*, BUS. WK., Jan. 29, 2007, at 60; Celia W. Dugger, *Gateses Give $47 Million to Bolster Coordinated Assaults on Diseases*, N.Y. TIMES, Dec. 20, 2006, at A5; Gloria Galloway, *Gates Joins Canada in AIDS Fight: Microsoft Founder Kicks in $28-Million; Ottawa Donates $111-Million for Research*, GLOBE & MAIL (Can.), Feb. 21, 2007, at A4; Daniel Gross, *Giving It Away, Then and Now*, N.Y. TIMES, July 2, 2006, § 3, at 4; Christopher Mason, *World Briefing Americas: Canada: Gateses Join in AIDS Vaccine Search*, N.Y. TIMES, Feb. 21, 2007, at A6; Peter Singer, *What Should a Billionaire Give—and What Should You?*, N.Y. TIMES, Dec. 17, 2006, § 6 (Magazine), at 58.

presumably total the benefits to both sides of each of Gates's myriad contracts, as well as the external benefits to non-parties. The latter would, of course, be quite substantial, as the advances reflected in the software Gates created and sold made the personal computer widely available, and so affected nearly everyone's life for the better—a little better in some cases, a lot better in others. On the other side of the ledger, one would total the benefits produced by help in the form of pledges and gifts of food, medicine, or other supplies to those desperately in need of them. On the way to drawing the comparative conclusion, one would have to solve some theoretical problems. One would need to determine whether interpersonal comparisons of utility are really possible and how the relative happiness of different individuals can be made commensurable. Once those problems were solved, the calculation could prove quite interesting, as it seems plausible to say that the Gates's bargains benefited a huge number of people—although the benefits may have been small in most instances—while the Gates's donations benefited a smaller number of people—but the benefits to each were quite dramatic. In the end, however, the process of arriving at the conclusion would amount to comparing the results of two extremely complicated mathematical sums.

Such a process is most emphatically not the approach Professor Markovits adopts in trying to explain and justify promising and contract in general or in trying to resolve specific moral questions. He purports to justify the making and keeping of promises and contracts in terms of the relationships between persons that they create.[275] It is the moral character of those relationships that performs the theoretical work for him, and the analysis appears to be inescapably qualitative, not quantitative.[276] He thus may not regard it as *axiomatic* that collaboration, in which each of two people treats the other as an end, is morally better than the respectful community generated by making and keeping a donative promise, in which only one party treats the other as an end.

Indeed, it is not at all obvious to me that he believes the latter proposition to be true. In particular, two suggestions he makes, in somewhat different contexts, indicate a certain degree of admiration for examples of self-sacrificing, generous, benevolent, or "other-regarding" behavior. First, as noted above, he recognizes a class of "personal" promises in which the benevolence of the promisor towards the promisee overcomes the lack of any return promise on the part of the promisee and permits the relation of collaboration to arise.[277] At least some donative promises, therefore, are "just as good" as bargain promises.

Second, he specifically distinguishes collaboration from cooperation and describes the latter as a "thicker" form of community.[278] Collaboration is perfectly compatible with each party acting in primarily self-interested ways.

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275. Markovits, *supra* note 2, at 1419-20.

276. The concepts to which he appeals in characterizing the moral value of the relationship created by promises are notions such as "recognition," "respect," and "community." *Id.* at 1420, 1428-35. Such concepts appear to defy any sort of straightforward quantitative treatment.

277. *Id.* at 1486.

278. *Id.* at 1457-58, 1461-63, 1483.

Collaborative promisors need only treat each other as ends by committing not to be the first to defect from the joint project defined by the promises. Within those bounds, however, each may seek to extract maximum benefit from the other. Those who are to be characterized as cooperative, on the other hand, must, in addition, commit to at least some support of the other without new reciprocal compensation—in effect, to engage in behavior that is, at least within the microcosm of the community between them, *donative*. In characterizing cooperation as a "thicker" form of community than collaboration, Professor Markovits does not quite say that it is morally *better*, but it is tempting to draw the conclusion that he believes it is. Benevolence thus seems to have its own independent moral value, which should surprise no one.

It thus seems at least open to Professor Markovits to conclude, in response to my hypothetical question, that Gates is more morally commendable for making and keeping his donative promises than his bargain promises (though he is to be congratulated for keeping both sets). Moreover, that is probably in accord with the well-considered moral judgments of most people,[279] or at least those who do not believe that morality is exhausted by the utilitarian calculus. There is something morally appealing about one-sided generosity or benevolence that is absent in collaboration for mutual benefit, commendable as the latter may be. One is tempted to conclude, with Professor Eisenberg, that "the world of gift is [indeed] a world of our better selves."[280] If that is the case, however, then it would seem that the more generic relation of respectful community created by making and keeping a donative promise is (or, at least, may be) as valuable as the collaborative relation created by the mutual promises required by the doctrine of consideration. For a theorist like Professor Markovits, for whom the foundation of contract and promising generally is a moral one, it therefore seems impossible to dismiss donative promises as unworthy of enforcement because they are not (or are not always) instances of collaboration. Indeed, if values other than collaboration, including "benevolence," "cooperation," or even "respectful community" generically, are of a dignity equal to (or even greater than) collaboration, they provide as much reason to enforce donative promises as collaboration provides for bargain promises.

CONCLUSION

This Article has required a detailed examination of two rather complex concepts, commodification and collaboration. Both are thoroughly normative. To those who use the term, "commodification," it describes an evil that is, at least sometimes, important to avoid. Why it is evil, the degree to which it infects society, and the forms of it that must be avoided are all subjects of some dispute,

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279. Like Professor Radin, I know of no ultimate way to test a theory such as that proposed by Professor Markovits other than by spinning out its implications and testing them against our considered moral judgments. *See* Radin, *supra* note 79, at 1904 n.208. Such a pragmatic approach seems to me to be virtually inevitable in the community of legal scholars we have.

280. Eisenberg, *Contract and Gift*, *supra* note 1, at 849.

and I have not attempted to resolve those disputes. Rather, my effort in response to Professor Eisenberg has been to show that no objectionable form of commodification would result from the enforcement of simple, affective donative promises.

Collaboration, on the other hand, is an ideal to which Professor Markovits urges us to aspire. My effort in response to his use of the concept has been to show that, even if he is correct that collaboration has some role in the justification of contract, it does not support drawing the boundary of enforcement at the same point as the traditional doctrine of consideration.

SHIELDING CHILDREN FROM VIOLENT VIDEO GAMES THROUGH RATINGS OFFENDER LISTS

KEVIN W. SAUNDERS*

INTRODUCTION

The past decade has seen a great deal of concern over the exposure of children to violent video games. Social scientists have provided a basis for that concern through studies linking the playing of such games to real world aggression,[1] but the links have not been sufficiently strong for the courts to accept legal limitations on access by children.[2] In each case, legislative limitations have been opposed by the video game industry, even though the industry's own ratings system considers many of the violent games unsuitable for children.[3] The purpose of this Article is not to suggest the abandonment of the legislative attempts at limiting access. The analysis of the courts rejecting the previous attempts has focused on the purported failure of the science to support the necessity of the restrictions to meet the accepted compelling interest in the physical and psychological well-being of youth.[4] That analysis is time bound. That is, all a court could say is that the science, as it existed at the time of the court's examination of the issue, failed to support adequately the limitations. That conclusion says nothing with regard to the science even six months or a year in the future, and each time a legislature tries to limit the access of children to violent video games, courts must examine the science anew. The continued development of social science, and the new insights being provided by neuroscience,[5] make the possibility that courts will recognize the necessity of these limits at some point in the future very real.

What is suggested here is that, at least as a temporary means of protecting children, parents be provided with notice as to which stores and arcades are allowing access to games that are inappropriate for their children, according to the video game industry's own ratings systems. There is evidence that media ratings systems may be confusing or misleading,[6] so parents may not recognize which games have been rated as inappropriate. There may also be confusion as to the legal status of the industry ratings systems. If parents believe that their children are not allowed to buy games or play games in arcades rated beyond the

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1. *See infra* notes 18-55 and accompanying text. The cited material also shows that the courts have not been receptive to the social science.

2. *See infra* notes 19, 27, 43-55 and accompanying text. *But see* notes 26, 31 and accompanying text.

3. *See infra* notes 92-117 and accompanying text.

4. *See infra* notes 18-55 and accompanying text.

5. For a discussion of the relevant neuroscience, see Kevin W. Saunders, *A Disconnect Between Law and Neuroscience: Modern Brain Science, Media Influences, and Juvenile Justice*, 2005 UTAH L. REV. 695.

6. *See infra* notes 108-14 and accompanying text.

ages of their children,[7] they may not realize what their children experience in arcades or buy in stores.

The confusion over what is available to children could be cleared up by attempts by either public interest groups or governmental units to have children purchase, or play in arcades, games rated as beyond their age. Where the attempt is successful, the name of the store selling the game or the mall or other place in which the arcade is located could be placed on a web site, using the model of sex offender web sites. Parents could then know the stores at which they may safely let their children shop and the malls at which their children may similarly "hang out." The video game industry and retailers will likely be unhappy with the effort and will certainly see it as the back door effort to limit children's access. Where the web site is compiled and accurately maintained by a private entity, there would be little recourse for the industry. However, where the effort is undertaken by a governmental entity, there is certain to be a First Amendment challenge, although it is a challenge that should prove to be unsuccessful.

This Article begins by examining briefly the failed efforts at shielding children from violent video games.[8] Part II examines the video game ratings system,[9] presents past "sting" operations,[10] and proposes such future operations.[11] Once the proposal is laid out, Part III examines the potential First Amendment and other constitutional challenges. The Article concludes with an examination of the potential content of the proposed web site and a discussion of "ratings creep."[12]

I. THE CASE LAW ON VIOLENT VIDEO GAME RESTRICTIONS

There has been a growing number of cases decided in this decade striking down limitations on children's access to violent video games. The first arose in 2000, when the combined city and county councils for the City of Indianapolis and Marion County, Indiana, passed an ordinance requiring that video arcades separate their sexually explicit and violent games from their more innocuous fare and not allow those under eighteen to play those games, unless accompanied by a parent, guardian, or custodian.[13] When the video game industry challenged the ordinance in federal district court, the court refused to enjoin its enforcement.[14]

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7. The Author has identified no studies on this issue, but is regularly asked why the video game industry is not subject to the same restrictions as the film industry. There is clearly a belief that the film industry ratings have a legal force that does not in fact exist for that similarly voluntary video game system.

8. *See infra* Part I.

9. *See infra* Part II.A.

10. *See infra* Part II.B.

11. *See infra* Part II.C.

12. *See infra* notes 133-341 and accompanying text.

13. The ordinance is discussed in *American Amusement Machine Ass'n v. Kendrick*, 115 F. Supp. 2d 943, 946-48 (S.D. Ind. 2000), *rev'd*, 244 F.3d 572 (7th Cir. 2001).

14. *Id.* at 981.

The court relied primarily on the variable obscenity doctrine found, as applied to youth, in *Ginsberg v. New York*,[15] stating that "the court is not persuaded there is any principled constitutional difference between sexually explicit material and graphic violence, at least when it comes to providing such material to children."[16] The court, however, did not rely solely on obscenity law; it also recognized a strong government interest in preventing or limiting the harmful effects it saw as demonstrated from violent video games.[17]

On appeal, the United States Court of Appeals for the Seventh Circuit rejected the inclusion of violent material with sexual material as potentially obscene when provided to youth.[18] The appellate court also rejected any connection between video game violence and real world violence. The court's view of the social science was that "[t]he studies do not find that video games have ever caused anyone to commit a violent act, as opposed to feeling aggressive, or have caused the average level of violence to increase anywhere. . . . Common sense says that the City's claim of harm to its citizens from these games is implausible, at best wildly speculative."[19]

The second attempt at a limitation was the passage of a St. Louis County ordinance, also in the year 2000.[20] The ordinance also addressed arcade play by minors without parental permission, but limited sales and rentals as well.[21] This time the age limit was seventeen.[22] Once again, the ordinance survived the first industry salvo, when the district court refused to enjoin enforcement.[23] The district court concluded that video game play is not an activity protected by the First Amendment.[24] That may seem an odd position, but if the creative aspects of game, design, artistic, and story presentation, are separated from the act of playing the game, an act that communicates to no one, it is a position that may be reasonable.[25] With regard to harm, the district court could not be more in opposition to the earlier Seventh Circuit opinion. As the district court saw it, "[f]or plaintiffs to . . . argue that violent video games are not harmful to minors is simply incredulous."[26]

On appeal, the Eighth Circuit did not express quite the degree of skepticism that the Seventh Circuit had, but still rejected the claims that the games posed a

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15. 390 U.S. 629 (1968).

16. *Am. Amusement Mach. Ass'n*, 115 F. Supp. 2d at 946.

17. *Id.*

18. *See Am. Amusement Mach. Ass'n*, 244 F.3d at 574-76.

19. *Id.* at 578-79.

20. The ordinance is discussed in *Interactive Digital Software Ass'n v. St. Louis County*, 200 F. Supp. 2d 1126, 1129-31 (E.D. Mo. 2002), *rev'd*, 329 F.3d 954 (8th Cir. 2003).

21. *Id.* at 1130.

22. *Id.*

23. *Id.* at 1141.

24. *Id.* at 1135.

25. *See* Kevin W. Saunders, *Regulating Youth Access to Violent Video Games: Three Responses to First Amendment Concerns*, 2003 MICH. ST. L. REV. 51, 93-105.

26. *Interactive Digital Software Ass'n*, 200 F. Supp. 2d at 1138.

danger to youth. Examining what seemed to be a limited submission of the available social science research, the court viewed the submissions as consisting of a "vague generality [that fell] far short of a showing that video games are psychologically deleterious" and the studies as "ambiguous, inconclusive, or irrelevant."[27] The court also held that video games are protected expression under the First Amendment, but did not distinguish between game design and game play.[28]

In the third case, the State of Washington focused restrictive legislation only on games in which the player shoots law enforcement officers.[29] The statute imposed a ban on distributing such games to minors, and the hope seemed to be that this approach, narrowly tailored to concerns over the safety of police officers, would survive constitutional challenge, where the others had failed. In addition, the State said that it wished to "to foster respect for public law enforcement officers."[30]

As it turned out, the statute fared no better, and ironically, it was the narrower focus that led to its downfall. The federal district court actually seemed receptive to the general concerns over media, and especially video game violence, saying that the State had

> presented research and expert opinions from which one could reasonably infer that the depictions of violence with which we are constantly bombarded in movies, television, computer games, interactive video games, *etc.*, have some immediate and measurable effect on the level of aggression experienced by some viewers and that the unique characteristics of video games . . . makes video games potentially more harmful to the psychological well-being of minors than other forms of media. In addition, virtually all of the experts agree that prolonged exposure to violent entertainment media is one of the constellation of risk factors for aggressive or anti-social behavior . . . .[31]

What made the statute unconstitutional was the fact that there was no evidence that those games in which players shoot law enforcement officers are any more dangerous than games in which players shoot other individuals.[32] While the court found fault in the social science studies submitted by the State, it did indicate that statutes that took aim at the most violent games, as opposed to focusing on virtual victim's identity, could, with more scientific support, be held constitutional.[33]

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27. Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954, 959 (8th Cir. 2003).

28. *Id.* at 957-58.

29. The ordinance is discussed in *Video Software Dealers Ass'n v. Maleng*, 325 F. Supp. 2d 1180, 1186-90 (W.D. Wash. 2004).

30. *Id.*

31. *Id.* at 1188.

32. *Id.* at 1188-90.

33. *See id.* at 1190. The court, while noting that it could not offer advisory opinions, did go on to indicate the "[k]ey considerations" in analyzing future violent video game statutes:

—does the regulation cover only the type of depraved or extreme acts of violence that

The results of the first three cases, while all losses in the attempt to restrict access by children to violent video games, provided some hope for eventual success. Interestingly, the district courts, the courts that regularly make the findings of fact, all seemed to see the danger involved in the games. Two were convinced and refused to enjoin the ordinances at issue.[34] The third also found the studies generally plausible, but found fault in the lack of specific results regarding law enforcement officers.[35] The third court indicated that the continued development of the science could lead to holdings of constitutionality.[36] However, in both successful cases the appellate courts not only declared the ordinances unconstitutional, but in doing so went against the conclusion of the traditional finders of fact and held that violent video games do not pose a danger to youth.[37] These appellate court decisions would prove to be important in their influence on later district court examinations of other statutes.

After a short lapse there was renewed activity, with 2005 seeing statutes adopted in the states of Illinois, California, and Michigan. All three were quickly challenged by the video game industry, with the Illinois case being the first to reach a final district court decision. The Illinois Violent Video Games Law imposed criminal penalties for the sale or rental to minors of violent video games and imposed labeling requirements.[38] The statute did define the games to be considered violent, as had the previous attempts, but the court found the definition vague.[39]

The court also examined the science offered to support the State's position and found it wanting.[40] It should be noted that the district court hearing the case

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violate community norms and prompted the legislature to act?

—does the regulation prohibit depictions of extreme violence against all innocent victims, regardless of their viewpoint or status? and

—do the social scientific studies support the legislative findings at issue?

Id.

34. *See* Interactive Digital Software Ass'n v. St. Louis County, 200 F. Supp. 2d 1126, 1141 (E.D. Mo. 2002), *rev'd*, 329 F.3d 954 (8th Cir. 2003); Am. Amusement Mach. Ass'n v. Kendrick, 115 F. Supp. 2d 943, 981 (S.D. Ind. 2000), *rev'd*, 249 F.3d 572 (7th Cir. 2001).

35. *Video Software Dealers Ass'n*, 325 F. Supp. 2d at 1188-90.

36. *Id.* at 1190.

37. *See Interactive Digital Software Ass'n*, 329 F.3d at 959; *Am. Amusement Mach. Ass'n*, 244 F.3d at 578-79.

38. The statute is discussed in *Entertainment Software Ass'n v. Blagojevich*, 404 F. Supp. 2d 1051, 1057-58 (N.D. Ill. 2005).

39. *See id.* at 1076-77. The statute addressed games in which there are "'depictions of or simulations of human-on-human violence in which the player kills or otherwise causes serious physical harm to another human. "Serious physical harm"' meant "'death, dismemberment, amputation, decapitation, maiming, disfigurement, mutilation of body parts, or rape.'" *Id.* at 1057 (quoting 720 ILL. COMP. STAT. 5/12A-10(e) (2006)). The court found vagueness in what constitutes a human in the fantasy world of video games and what constitutes serious harm to such creatures, who may for example sprout a new arm in the place of one cut off. *See id.* at 1076-77.

40. *Id.* at 1059-75.

is a part of the Seventh Circuit, the circuit that had already expressed skepticism regarding the science in the Indianapolis case. The State, faced with this previous determination, seemed to recognize that it had to rely on newly developed science, science on which the circuit had not ruled. The State offered recent video games studies and a study on the neurological effects of violent media, but the court rejected both.[41]

As for the social science, the State brought in Professor Craig Anderson as an expert. Professor Anderson is the leading researcher in the area, and that turned out, in a way, to be a problem for the State.[42] In rejecting the social science, the court noted that fourteen of the seventeen scholarly articles in the legislative record were authored or co-authored by Professor Anderson, one was written by a colleague, and the other two were written by a scientist who relied on Anderson's work in developing his own studies.[43] Rather than taking this as a sign of the preeminence of Professor Anderson, and also seemingly failing to recognize the peer review process that the articles had to undergo, the court seemed to find that the, in a sense too great, expertise weakened the testimony.

The court also heard testimony from two other scientists with what it took to be views contrary to those of Anderson. Dr. Jeffrey Goldstein, a social scientist in the Netherlands, has completed research that shows video games can "improve cognitive skill."[44] That, in fact, seems quite likely, but no one really argues that no good can come from the games. The second scientist was a relatively newly minted communications professor, Dr. Dmitri Williams, whose dissertation was based on a one-month study of individuals playing a violent, multi-player game,[45] but multi-player games contain a social interaction that might distinguish them from the video games in Anderson's studies.

What the industry witnesses testified to was that Anderson's work fails to establish causation, although they agreed that there was a correlation between exposure to video game violence and increased aggression.[46] They also had some methodological concerns regarding Anderson's studies,[47] but that sort of concern may always be raised, and it is again worth noting that Anderson's work was subject to peer review. On the causation issue, it should be noted that causation is never directly observed. It is always the conjunction, the correlation, of events that is present to the senses, and causation is an inference from the circumstances and that correlation. It did allow the court to state that it could not determine from correlation which way causation runs: "it may be that aggressive children may also be attracted to violent video games."[48] Maybe so, and maybe people with precancerous lung irritations are drawn to cigarette smoke and people with

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41. *Id.*
42. *Id.* at 1059.
43. *Id.* at 1058.
44. *Id.* at 1062.
45. *See id.*
46. *See id.*
47. *Id.*
48. *Id.* at 1074.

low IQs are more inclined to eat lead based paint, but Anderson's laboratory studies, again rejected by the court as insignificant, again despite peer review, purport to show the direction of causation.[49]

The court also was unimpressed at the effect size in Anderson's studies. In its analysis of one study involving noise blasts, the court noted that

> on a one to ten scale of intensity, the most "aggressive" violent video game players administered an average blast of 5.93, and the least "aggressive" non-violent video game players administered an average blast of 3.98. There was only a two point difference, and both averages were in the middle of the intensity scale.[50]

However, the "two point" difference could also be described as a near fifty percent increase. It is also not clear what the significance of being near the middle of the scale is and whether a two point difference at one end would really be any different.[51]

The court also addressed the recent brain science results regarding violent media. Dr. William Kronenberger testified regarding an experiment in which the functioning of the brains of adolescents engaged in a computer recognition task were examined using functional magnetic resonance imaging.[52] The results showed that adolescents with greater exposure to violent media had a brain functioning in the regions of the brain normally associated with aggressive or violent behavior or with inhibition that differed from the brain functioning of children with less exposure to violent media.[53] Furthermore, the functioning of the high exposure group was similar to that of adolescents diagnosed with disruptive behavioral disorders.[54]

In response, the industry offered rebuttal from a cognitive psychologist who criticized two assumptions he saw as affecting the studies. The first criticism was that it had been assumed that there was a "one-to-one relationship" between behaviors and brain regions, and the second was that it had been assumed that a decrease in activity in a region of the brain should be considered an impairment or deficiency and that "decreased activity can signal expertise or use of an alternate method to complete the assigned task."[55] Even accepting that criticism

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49. *Id.* at 1060-61 (discussing studies briefly). There is also a citation to an article on the causation issue. *Id.* at 1061 (citing Douglas A. Gentile & Craig A. Anderson, *Violent Video Games: The Effects on Youth, and Public Policy Implications*, *in* HANDBOOK OF CHILDREN, CULTURE, AND VIOLENCE 225, 232 (N. Dowd et al. eds., 2006)).

50. *Id.* at 1061.

51. The percentages would of course change. A two-point increase from eight to ten would only be a twenty-five percent increase, while a two-point increase as the lower level approaching zero would grow without bound. As to the issue of being mid-scale, it depends entirely on how the scale is set up.

52. *Entertainment Software Ass'n*, 404 F. Supp. 2d at 1063-65.

53. *Id.*

54. *Id.*

55. *See id.* at 1066.

as valid, and there seemed to be no offering of evidence of any such alternative method, the result is still that there is a decrease in that region of the brain normally responsible for controlling behavior, and the resultant functioning is more similar to the functioning of a disruptively behaviorally disordered adolescent than a normal adolescent.

Had that been the end of the court's analysis, coupled with a conclusion that the State had not demonstrated the necessity of violent video game bans to meet the compelling government interest in the physical and psychological well-being of youth, the conclusion might arguably have been wrong, but it would only have been another in a short line of cases saying the science is not yet there. The court, however, went on to make an error of law that poses a more serious threat to future attempts, and if the science is correct, to the nation's youth.

Adopting the industry's legal theory, the court said that "when it comes to regulating expression protected by the First Amendment, the state may regulate only expression that meets the requirements of *Brandenburg v. Ohio*."[56] As the court explained, "the State may regulate protected expression based on the belief that it will cause violence only if the expression is directed to inciting or producing imminent lawless action, and is likely to incite or produce such action."[57] However, *Brandenburg* is not the appropriate test. *Brandenburg* concerned a meeting of the Ku Klux Klan and whether the leader of the rally could be charged under a criminal syndicalism law.[58] It was the culmination of a long line of cases stretching from World War I through the Cold War, all of which addressed rallies or speeches at which the audience was exhorted to perform some illegal act.[59] *Brandenburg* is the test for charges of attempting to cause public disorder, criminal solicitation, or accessory liability based on that solicitation. It is even an appropriate test for tort liability of a speaker, when a member of the speaker's audience commits an unlawful act.[60] It is not the appropriate test for the sort of public health argument offered in the case of video games.

The inappropriateness of *Brandenburg* is demonstrated by an admittedly far-fetched example. Suppose the science developed in the direction of showing that

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56. *Id.* at 1073 (citing Brandenberg v. Ohio, 395 U.S. 444 (1969)).

57. *Id.* (citing *Brandenberg*, 395 U.S. at 447).

58. *See Brandenberg*, 395 U.S. at 444-47.

59. *See id.* at 447-48.

60. Thus, *Brandenburg* is relevant when a victim or victim's survivors sue a video game manufacturer on the theory that the crime was the result of video game play. *See* James v. Meow Media, Inc., 300 F.3d 683 (6th Cir. 2002). It was also the relevant test in *Zamora v. Columbia Broadcasting System*, 480 F. Supp. 199 (S.D. Fla. 1979), a case in which the claim was that a television caused a criminal act. Furthermore, it was relevant in *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997), where judgment against the publisher of a manual for contract killers was used in the commission of a multiple murder. There was a lack of imminence between the publication date and the murders, but the admission by the publisher that it expected and intended that the manual be used as it was, combined with the detailed instructions, allowed liability to be imposed. *Id.* at 249.

thirty years of violent video game play invariably caused the deterioration of the entirety of the brain region or regions responsible for judgment and inhibition. Invariably, such players become extremely violent and incapable of controlling their emotions. If *Brandenburg* is the test, the state could not prohibit video game play, even in light of this evidence. The video game makers would still not intend to incite or produce the lawless action. There would also not be the imminence that the court here required, at least until just before the violent effect hypothesized was about to occur and clearly after there had been significant damage to the players' brains.

Brandenburg is best seen as a way of meeting strict scrutiny, when the concern is intentionally induced lawless action. The serious lawless action provides the compelling interest, and the imminence indicates that stopping the speech is necessary to that interest. If the act were not imminent, the remedy would be counter speech, rather than a ban. However, *Brandenburg* is not the only way to meet strict scrutiny where speech is involved. The Supreme Court, in *Burson v. Freeman*,[61] recognized the applicability of the more traditional strict scrutiny test. That case involved a Tennessee statute barring campaigning within one hundred feet of any polling place.[62] While the speech involved, political speech, is at the core of the First Amendment, the Court found a compelling interest in elections being free from coercion and fraud and that the ban was necessary to that interest.[63]

Bans on violent video game play by children may have to meet strict scrutiny, assuming the rejection of the obscenity theory of the district court in the Indianapolis case and the lack of protection argued by the district court in the St. Louis case, but they do not have to meet the test of *Brandenburg*. Instead, there needs to be a compelling government interest, and the physical and psychological well-being of youth is such an interest. There also needs to be a demonstration that the ban is necessary to that interest, a showing that has so far been seen as lacking in the existing science.

Another recent case declared a California statute unconstitutional.[64] The opinion broke no new ground in analyzing the scientific evidence. The court simply surveyed the prior case law, including the Seventh and Eighth Circuit Indianapolis and St. Louis cases, the Washington and Illinois district court opinions, and the preliminary injunction against the enforcement of the Michigan statute,[65] and from those opinions determined that the plaintiffs were likely to prevail on the merits of their claim of unconstitutionality.[66]

However, the California court did reach several conclusions that are

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61. 504 U.S. 191 (1992).

62. *Id.* at 193.

63. *Id.* at 199.

64. *See* Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034 (N.D. Cal. 2005).

65. The opinion and judgment establishing the permanent injunction against the Michigan statute is discussed *infra* note 77 and accompanying text.

66. *Video Software Dealers Ass'n*, 401 F. Supp. 2d at 1043-44.

important to any continuing efforts to limit the access of children to these games. First, the plaintiffs argued that the analytic framework to bring to bear in the case is that found in *Brandenburg*, but the court rejected that approach.[67] The court recognized that *Brandenburg* applies to expression directed to producing or inciting imminent illegal acts, but it said "[t]he Act seems to be intended more to prevent harm to minors than preventing minors from engaging in real-world violence."[68] As the court recognized, the claims against violent video games are not that their designers and manufacturers are trying to induce minors to commit violent acts or that they are teaching children dangerous ideology. Rather the claims are that the games cause psychological and even neurological damage to children, damage which may eventually manifest itself in violence, unintended by the game developers and not driven by the developers' ideologies. There have also been claims that the games may teach skills that are dangerous for children to possess.[69] The court applied strict scrutiny, and given the rejection of the scientific evidence by other courts, found the statute to fail that test.[70]

A second important point from the California court's opinion is found in its rejection of the defendants' theory of the case in deciding the strict scrutiny standard. As had the prior courts, with the exception of the Indianapolis court, the court rejected reliance on *Ginsberg v. New York*.[71] *Ginsberg* upheld a New York statute addressing material that is harmful to minors, using a variable obscenity doctrine that judged obscenity by a standard applicable not to adults, but to minors.[72] The California court did not follow the defense suggestion, noting that neither the Supreme Court nor the Ninth Circuit had extended

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67. *Id.* at 1045.

68. *Id.*

69. David Grossman, a former psychology instructor at the U.S. Military Academy discusses the shootings by Michael Carneal at Heath High School in the Paducah, Kentucky area. *See* DAVE GROSSMAN & GLORIA DEGAETANO, STOP TEACHING OUR KIDS TO KILL: A CALL TO ACTION AGAINST TV, MOVIE AND VIDEO GAME VIOLENCE 75-76 (1999). Carneal killed three and wounded five, all with wounds to the head or upper torso, with only eight or nine shots. *See id.* at 76. Carneal developed this remarkable accuracy not through firearm training, but through video game exposure, and that training was reflected in his manner. *See id.* Carneal

> never moved his feet during his rampage. He never fired far to the right or left, never far up or down. He simply fired once at everything that popped up on his "screen." It is not natural to fire once at each target. The normal, almost universal, response is to fire at a target until it drops and then move on to the next target. This is the defensive reaction that will save our lives, the human instinctual reaction—eliminate the threat quickly. Not to shoot once and go on to another target before the first target has been eliminated. But most video games teach you to fire at each target only once, hitting as many targets as you can as fast as you can in order to rack up a high score. And many video games give bonus effects . . . for head shots.

Id. at 75-76.

70. *Video Software Dealers Ass'n*, 401 F. Supp. 2d at 1048.

71. *See id.* at 1045 (citing Ginsberg v. New York, 390 U.S. 629 (1968)).

72. *Id.*

Ginsberg beyond the sexual focus of that case.[73] However, the court went on to state that

> [n]or, on the other hand, have the plaintiffs shown that either the Supreme Court or the Ninth Circuit has ever held that sexual obscenity represents a unique category of expression that is the only category to which a state may permissibly restrict minors' access without running afoul of the First Amendment.[74]

The California court then, while not following the lead of the Indianapolis court, recognized that at the Supreme Court level, and at its own circuit level, the theory had not been rejected.[75]

The last point to be drawn from this case is in the court's response to the plaintiff's assertion that the California statute was unconstitutionally vague. Without going into the details of the definitions contained in the statute, the court concluded that they were sufficient for the ordinary person to apply to the video games at issue.[76] Thus, the California court established that the task of defining the category of games to which violent video game statutes apply is not impossible. Legislatures drafting later statutes may be guided by the approach found in the California statute.

The decision of the Michigan federal district court,[77] in striking down that state's statute, was less than clear in terms of the applicable theory. It was clear that the court rejected the State's reliance on *Ginsberg*, but when it came to the plaintiffs' suggestion that *Brandenburg* is the proper test, the court stated both that test and the strict scrutiny test.[78] Since the court indicated that neither test would be satisfied,[79] in the end it may have made no difference, but again, it should be pointed out that the proper test is strict scrutiny. There may be no difference now, but if the science continues to develop to the point where the need to limit violent video game access is seen as necessary to the well-being of youth, the choice of test will be important.

Still more statutes were enacted in 2006 and quickly met the same fate. A Louisiana statute again criminalized the sale or rental to minors of violent video games, but it was struck down in *Entertainment Software Ass'n v. Foti*.[80] The federal district court granted a preliminary injunction against the enforcement of

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73. *Id.*

74. *Id.*

75. On this topic, see generally KEVIN W. SAUNDERS, VIOLENCE AS OBSCENITY: LIMITING THE MEDIA'S FIRST AMENDMENT PROTECTION (1996).

76. *Video Software Dealers Ass'n*, 401 F. Supp. 2d at 1041-42.

77. Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646 (E.D. Mich. 2006). The Michigan statute provided a defense based on the video games industry's ratings. No one could be convicted if the sale was to a person within the age rating for the game involved.

78. *Id.* at 651-52.

79. *Id.* at 651-55.

80. 451 F. Supp. 2d 823 (M.D. La. 2006).

the ordinance and in doing so, followed the lead of the earlier cases.[81] The court took as well established that video games enjoy First Amendment protection, and since it involved sales rather than play, not drawing the distinction between the software and presentation, on the one hand, and game play on the other, was proper.[82] Thus, strict scrutiny is required, but this court also seemed to believe that the *Brandenburg* test is the only way to meet strict scrutiny where violent media is involved.[83] "Seemed" is the right word because the court went on to consider evidence that would speak to the dangerousness of the media on a basis other than advocacy of violence.[84] That evidence was rejected, based primarily on the fact that it had been rejected by other courts, but it was also noted that the legislative record was rather weak, relying on secondary sources rather than primary source psychological studies.[85]

A second 2006 statute took a different approach with the same result. A Minnesota statute would have imposed a fine for the sale of violent video games not on the retailer, but on the minor buying a game rated beyond the child's age.[86] Again the industry challenged the statute, and in *Entertainment Software Ass'n v. Hatch*,[87] the federal district court issued a permanent injunction.[88] Following previous courts, the court took video games as protected and applied strict scrutiny, properly looking for a compelling interest to which the statute was necessary or narrowly tailored.[89] In so doing, the court found the evidence lacking as to video games harming the physical and psychological well-being of youth.[90] The court was also concerned with the statute's sole focus on video

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81. *Id.* at 837.

82. *See id.* at 829-31.

83. *See id.* at 830-33.

84. *See id.* at 832.

85. *See id.*

86. MINN. STAT. § 325I.06 (2006).

87. 443 F. Supp. 2d 1065 (D. Minn. 2006).

88. *Id.* at 1073.

89. *Id.* at 1068-70.

90. *Id.* at 1069. Given that not that much time had elapsed since the previous year's cases, the result is certainly not surprising. It is still important to note, however, that as the science develops, it may reach the point where prior determinations of inadequacy may no longer apply. More disturbing in the opinion is the suggestion that science can demonstrate only correlation rather than causation. *See id.* at 1069-70. The move from correlation to causation is common in many other areas, and laboratory experiments and certain factors in longitudinal studies can indicate causation.

There is also a footnote in the opinion that may indicate a lack of understanding of how meta-analysis works. The court said, seemingly with skepticism, that "Dr. Anderson's meta-analysis seems to suggest that one can take a number of studies, each of which he admits do not prove the proposition in question, and 'stack them up' until a collective proof emerges." *Id.* at 1069 n.1. That is just what meta-analysis can do, and it makes common sense. The significance of a result depends in part on the size of the samples. The fact that a single apple drawn from one barrel is sweeter than a single apple drawn from another may not lead one to make confident statements

games as a source of danger and with due process in the adoption of a rating system developed by a nongovernmental body.[91]

All the statutes have been struck down, and that is why the alternative presented here is being suggested. The alternative suggestion is not based on any conclusion that courts always will continue to reject bans on children's access to violent video games. The science may well develop to the point that the bans are seen as justified, at least as long as the courts apply the correct strict scrutiny test and are not led by the industry into the incorrect view that *Brandenburg* is the test to apply. The suggestion offered is a stopgap measure designed to help parents limit their own children's access until that time may come. Of course, if the industry prevails on the test to apply or if the science never develops, the suggestion made here may have to serve its protective role indefinitely.

II. RATINGS, STINGS, AND WEB SITE LISTS

A. The Video Game Industry Rating System

The Entertainment Software Rating Board ("ESRB") has established a rating system for video and computer games.[92] Games fall into one of six rating categories. A game rated "Early Childhood" is seen as appropriate for ages three and older and "[c]ontains no material that parents would find inappropriate."[93] Games rated "Everyone" are seen as suitable for everyone aged six or older and may contain mild violence.[94] "Everyone 10+" rated games are said to be appropriate for ages ten and above and may contain an increased amount of mild violence.[95] "Teen" rated games, seen as appropriate for those thirteen and older, "may contain violence . . . [and] minimal blood."[96] Games rated "Mature" are said to be suitable for those seventeen and older and "may contain intense

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about the overall differences between the qualities of the two lots. A consistent result over a dozen makes one more confident and over a gross may give one great confidence. Meta-analysis allows the combination of many studies that may involve samples inadequate to establish a result to be combined. If the single apple "study" is replaced not by a study of a gross of apples from each barrel, but is augmented by an additional 143 single apple studies, the same increase in confidence is warranted.

91. *Id.* at 1070-71. The Michigan statute had provided a definition for violent video games and then allowed the fact that a sale was in accord with the ratings as a defense. Here the offense was defined by the ratings. *See* Entm't Software Ass'n v. Granholm, 426 F. Supp. 2d 646 (E.D. Mich. 2006).

92. Entertainment Software Rating Board, Game Ratings & Descriptor Guide, http://www.esrb.org/ratings/ratings_guide.jsp (last visited Nov. 26, 2007). The organization's web site explains the ratings process, and the ratings and descriptors that result from that process. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

violence, blood and gore."[97] The highest rating, "Adults Only," should be played only by those eighteen and older and may include "prolonged scenes of intense violence."[98] Violence is not the only input in the determination of a rating; language, sexual themes, and gambling may play roles as well.[99] The ESRB also provides content descriptors for the games indicating levels or types of violence, nudity, drug or alcohol use, etc.[100]

The ratings and descriptors are the result of a process spelled out by the ESRB. Before they release a game, publishers submit a response to an ESRB questionnaire regarding the game's content.[101] The publisher also provides a videotape or DVD that is supposed to depict the most extreme content in terms of violence, sex, language, etc.[102] The submissions are examined by trained game raters, all of whom are adults and typically have professional or parental experience with children.[103] The raters use their own judgment, but are checked for consistency both among the independent raters of the particular game and from game to game.[104] If a publisher does not like the rating a game receives, the content may be changed or the rating appealed to a board "made up of publishers, retailers and other professionals."[105]

The ratings have no legal force, as the video game cases demonstrate. The ESRB can impose sanctions against publishers who voluntarily submit to the ESRB's jurisdiction, but that only addresses the rating process itself.[106] With regard to retail sales, the ESRB says it works with retailers and game centers to provide in-store signs explaining the ratings and supports training store employees on the ratings system;[107] however, there is no enforcement involved.

There is some dispute as to how effective the ratings are in helping parents determine what games are appropriate for their children. A study by researchers at Harvard revealed differences over what ratings and descriptors should have attached to particular games.[108] Of the games they studied, the researchers found

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97. *See id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Entertainment Software Rating Board, Ratings Process, http://www.esrb.org/ratings/ratings_process.jsp (last visited Nov. 26, 2007).

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* It is not immediately clear from what profession the professionals are to be drawn.

106. Entertainment Software Rating Board, Enforcement, http://www.esrb.org/ratings/enforcement.jsp (last visited Nov. 26, 2007).

107. *See id.*; *see also* Entertainment Software Rating Board, Retailers, Frequently Asked Questions, http://www.esrb.org/retailers/faq.jsp (noting that game centers that register with ESRB may download ratings education material or order ratings signs) (last visited Sept. 1, 2007).

108. Kevin Haninger & Kimberly M. Thompson, *Content and Ratings of Teen-Rated Video Games*, 291 JAMA 856 (2004), *available at* www.kidsrisk.harvard.edu/mainFrame/news/faqs4.html.

that 48% of the sample could have had, but did not have, an ESRB descriptor.[109] In another 9% of the games there was a descriptor, but the researchers did not find the material indicated.[110] This failure to find the material may well be due to the fact that the games were played for only one hour, and the material described could be in later stages of the games. The study led to recommendations that there be greater clarity in the descriptors and in the overall rating process and that the rating process include playing the games.[111]

The National Institute on Media and the Family also suggests that the ESRB ratings underrate some games, rating them as appropriate for teens, when they should, in the Institute's view, be rated for a mature audience.[112] This criticism has been repeated by legislators. For example, Senator Sam Brownback has argued for a "Truth in Video Game Rating" Act that would require raters to play the games "'in their entirety'" and would provide punishment for rating groups that "'grossly mischaracterize'" game content.[113] On the House side, Congressman Joe Baca has been a regular critic, arguing that the ratings are not sufficiently clear and do not provide enough information and that parents are thus misled.[114]

On the issue of parents being misled, there is some question as to how much input parents have been playing in the purchase of video games. The National Institute on Media and the Family found that its survey did not really comport with ESRB claims that 74% of parents regularly use the ratings and that 94% find them helpful.[115] Their study showed that while 73% of parents say that they always help decide on the games their children buy or rent, only 30% of children reported that their parents played such a role.[116]

Whatever may be the role of parents and the accuracy or appropriateness of the ratings, adherence to the ratings at the retail level would provide some protection for children. Indeed, it is a protection with which the Michigan statute was seemingly satisfied.[117] If the ratings have little such effect, they are merely window dressing. That, of course, leads to the question of retail practices.

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109. *Id.*

110. *Id.*

111. *Id.*

112. DAVID WALSH ET AL., NAT'L INST. ON MEDIA & THE FAMILY, 11TH ANNUAL MEDIAWISE VIDEO GAME REPORT CARD 2 (2006), *available at* http://www.mediafamily.org/research/2006_Video_Game_Report_Card.pdf.

113. *See* Anne Broache, *Senator Wants to Ban "Deceptive" Video Game Ratings*, CNET NEWS.COM, Feb. 14, 2007, http://www.news.com/2100-1028_3-6159413.html. In response, a representative of the Entertainment Software Association questioned whether one could "play a game in its 'entirety' when a game has no defined end?" *See id.* While the games have no defined end, they do have finite content that sufficient play would seem likely to expose.

114. *See, e.g.*, Claire Vitucci, *Baca Pushes to Clarify Video-Game Ratings*, PE.COM, Apr. 27, 2006, http://www.pe.com/localnews/inland/stories/PE_News_Local_H_game27.fddc7b9.html.

115. *See* WALSH ET AL., *supra* note 112.

116. *Id.*

117. *See supra* note 77.

B. A History of Sting Operations

The ratings, no matter how much information they may provide, are not prohibitions. They can serve a role in letting parents know the content of games available for sale or play and guide them in their choices if they purchase games for their children. They cannot, without more, limit the ability of children to buy the games themselves. Indeed, this has been the focus of statutes tying bans to the ratings system. It is an effort, however, that the industry has fought with success. Even when the only attempt is to bar sales of games to children below the age at which the industry established ratings regime has said is appropriate, the industry has balked. Because the ratings have not been legally enforceable, the only source of limitation on direct sales to children would have to be with retailers and the operators of video arcades. Those limitations have only been partially successful.

The limited success in the retail realm is shown by sting operations or undercover shopping. While there are smaller local or state efforts to test the vigilance of the retail sector in enforcing the ESRB ratings,[118] there are also more widespread, even national, studies. The Federal Trade Commission conducted undercover shopping tests in 2000, 2001, 2003, and 2005.[119] Children between the ages of thirteen and sixteen were sent into stores, without a parent, to attempt to purchase an M-rated game, that is, a game rated as suitable for those seventeen and older.[120] The most recent study, starting in 2005, but running into January 2006, tested 406 stores in forty-three states.[121]

The results over the four studies show increasing diligence on the part of retailers. In 2000, 85% of the attempts were successful.[122] That dropped to 78% in 2001, 69% in 2003, and 42% in 2005.[123] While the progress is positive, it is still the case that in better than two of five attempts, the child was able to purchase an inappropriate game.

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118. *See, e.g.*, Emily Robinson, *Sting Targets Video Games*, ST. NEWS, Nov. 10, 2000, *available at* http://www.statenews.com/index.php/article/2000/11/sting_targets_video_games (discussing sting operation by then Michigan Attorney General Jennifer Granholm). The ESRB Retail Council requires member retailers to participate in two "mystery shopper" audits per year. *See* Entertainment Software Rating Board, ESRB Retail Council, http://www.esrb.org/retailers/retail_council.jsp (last visited Aug. 19, 2007). The results, however, are published only "in aggregate." *Id.*

119. For the results released in March 2006, see FED. TRADE COMM'N, UNDERCOVER SHOP FINDS DECREASE IN SALES OF M-RATED GAMES TO CHILDREN: RESULTS FROM THE 2005 NATIONWIDE UNDERCOVER SHOP DEMONSTRATE NEED FOR CONTINUING IMPROVEMENT (2006), http://www.ftc.gov/opa/2006/03/videogameshop.shtm. The publication recounts the results of all four studies.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

A second measure looked at was whether the cashier or clerk asked the child his or her age. The progression in stores asking age, over the four periods studied, went from 15% to 21% to 24% to 50%.[124] Again, the increase in likely inquiry is positive, but 50% of the children were still not asked.

An interesting difference is seen when stores that are part of a national chain are compared with local or regional retailers. At the national retailers, 35% of the children were successful, while at the local and regional stores, 63% were successful.[125] Of the national retailers, 55% asked the child his or her age, while the local and regional retailers asked the child's age only 35% of the time.[126]

The National Institute for Media and the Family conducted its own series of undercover buy attempts.[127] The most recent, conducted in 2006, used a much smaller sample of twenty-five retail locations in five states.[128] That series of studies in four consecutive years showed a similar decrease in successful purchases by children, although not with the same monotonicity. In 2003, 55% had been successful; in 2004, 34% were successful; in 2005 it was 44%; and in 2006, 32% were successful.[129] The variability in small samples is not surprising, and again the general trend in decrease is a positive development. The Institute also found the same difference between national and local retailers. Best Buy, Target, and Wal-Mart all had perfect scores, but "specialty stores seem more interested in making money than anything else," and buys were successful half the time.[130]

National chain stores are, of course, also interested in making money. Perhaps they are also more socially responsible, but it may instead be that they are more wary of negative publicity. A failure by a national chain to limit the access of children to Mature-rated games could generate national negative publicity. The failure of a local store to do so has, so far, seemed to generate no publicity aimed at the particular store. While it is worth lauding the practices of Best Buy, Target, and Wal-Mart, it would also be worth making available to the public the identity of stores that are not as socially responsible.

There also seems to be a dearth of studies of video game arcades. Perhaps this is due to a reluctance to expose the underage testers to the violent depictions playing the games would involve. After all, buying the game exposes the child only to the box, while playing the game exposes the child to the action of the game. Given the largely local nature of video game arcades, it would seem reasonable to expect that children would be at least as successful in playing the games as they were in buying them from local and regional retailers. There is also the fact that there is less likely to be the one-on-one encounter with a clerk or cashier that would provide the easy opportunity to ask for an indication of age.

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124. *Id.*
125. *Id.*
126. *Id.*
127. *See* WALSH ET AL., *supra* note 112.
128. *Id.*
129. *Id.*
130. *Id.*

C. The Sting/Web Site Proposal

What is proposed here is that there be more regular and widespread conduct of undercover shopper and undercover player operations. These operations would be coupled with web sites, modeled on the sex offender web site, on which those establishments making inappropriate games available to children would be listed. Rather than national studies of retailers, which may provide the parent with little or no information regarding the local store, local studies would allow parents to know where their children can safely shop or play.

Local or state authorities would arrange for children to attempt to purchase age-inappropriate games. The same would occur involving attempts to play inappropriate games in video arcades. While there might be reluctance to expose children to the violent images in the games, children could at least start to play to see if they were interrupted by the arcade operator. Rather than a statistical result for success and failure, a list of the individual stores and arcades that failed to limit youth access would be compiled.

The web site aspect of the proposal is necessary to its success. Even if a local operation is conducted and there is immediate local publicity, the rapidity with which the results would become old news would lessen its impact. If the results are maintained on a web site, either one provided by the local government unit or perhaps better by a state government web site searchable by postal code, the publicity would not fade away. Parents could always turn to the web site to know how concerned the retailer or arcade is with their children's exposure to games rated beyond their ages.

There should be follow-up studies, both out of fairness to retailers and arcade operators, and so as not to be self-defeating. It would be self-defeating if, once a retailer or arcade operator is on the list, it always remained on the list. There would then be no incentive to change its practices. Furthermore, a retailer or arcade operator that sees the error of its ways ought to have the opportunity to clear its record. A later undercover buy or play operation in which the child was refused access should remove the retailer or operator from the web site list. The follow ups do not have to occur at great regularity because a period on the list is to serve as a deterrence, but they should occur at reasonable intervals.[131]

The effect of these controlled efforts would be to provide a disincentive to retailers and arcade operators to provide age-inappropriate games to children. Parents have the choice of not allowing their children to shop at stores that are on the list. Indeed, parents may themselves choose not to patronize such stores. Parents may also choose not to allow their children to spend time at video arcades or the malls that contain them, if the arcade does not prevent children from playing games rated beyond their age. Parents themselves may also complain to

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131. The most appropriate length of the interval between original and follow up attempts would seem to be an empirical question. Experience will indicate how long a retailer or operator will have to remain on the list to provide sufficient deterrence, while still providing incentive to improve.

mall operators or choose not to shop at the malls containing the offending arcades.

Any of these possible effects brings economic pressure on stores and malls to prevent children from buying or playing these games. It is important to note that the direct economic pressure comes not from the government, but from private citizens. It is parents and others who would refuse to shop at or would complain to stores and malls. While the governmental entity involved would provide the information so that parents know what to target for their criticism, the direct pressure is not governmental. The video game industry might well still see a First Amendment concern in these operations and web lists, but the program should stand up to a First Amendment challenge.[132]

D. Forbidden Fruit

The possibility of the web site lists serving as an enticement should also be briefly considered. The "forbidden fruit" effect in which individuals seek out that which is denied them is always a concern with bans. Any forbidden fruit aspect of the games themselves is already present in the rating system. The web site list does not itself rate games nor need it even indicate which games were successfully purchased or played. Children know what games are rated as beyond their age from walking through stores or arcades, and they gain no new knowledge on that subject from the proposed web site list.

What children might glean from the list is the places at which others have been successful in buying or playing the games. Again, children often know where they can obtain goods not allowed to them, and they would probably have knowledge of which retailers or arcade operators do not ask for proof of age without the benefit of the list. Furthermore, once an entity goes on the list, the negative publicity would, one would hope, have the effect of reducing the likelihood that age-inappropriate games would continue to be accessible. This is, at any rate, a contingent question. If the web site list turns out to be a furtherance of children accessing these games, it can be discontinued. It seems more likely that the economic pressure against the retailer or mall, where an independent retailer or video arcade is involved, would lessen access.

III. Legal Issues Surrounding the Proposal

The First Amendment does not mention speech by the government. In limiting the law making authority of the government, the Amendment speaks most clearly to the protection of individual expression. This is, of course, the variety of expression that needs protection against government limitations. Leaving aside cases in which federal and state interests may be at odds, it seems strange even to consider the need for the government to protect its speech from its own abridgments. Yet, government does, and must, speak regularly. It informs the people of its policies and, in providing the rationales for those policies, may be seen as advocating positions on political or social issues. This

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132. *See infra* Part III.A-B.

section will provide an examination of some of the early work on government speech.[133] It will then turn to an examination of the cases in which speech by the government has been argued to be an infringement of the speech rights of others.[134] Lastly, it will turn to the possible due process issues that may arise in compiling the web site list suggested.[135]

A. Government Speech

An examination of scholarship in the area of government speech must begin with the seminal work of Thomas Emerson.[136] Emerson recognized that government participation in the public debate is both enriching and essential, but that it also poses serious risks:

> Emanating from a source of great authority . . . government expression carries extra psychological weight for many citizens. It comes from officials who often wield enormous actual power over those they address, thereby evoking concern in the listener lest he offend the powers that be by appearing to oppose. The government controls many of the sources of information in the society. It also possesses almost unlimited capacity to reach all members of the community . . . .[137]

Despite this concern, Emerson argued that expression can remain free, as long as the government's speech does not overpower other voices.[138]

Emerson analyzed a number of issues arising out of government speech, but the one relevant to the discussion here is in a section titled, "Use of Government Expression as a Sanction Against Private Expression."[139] That would be the claim of the video game industry against the sting and web list proposed here. Any government sponsored web list would certainly be government expression, and the industry would argue that it is an attempt to sanction stores, arcades, and malls for their own delivery of expression to children. Emerson sought to balance the government's right of expression with the "special impact" it could have on the system of free expression. In doing so, he pointed to the concern most often raised by the cases.[140]

> Most commonly [deterrence or suppression] takes place when the

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133. *See infra* Part III.A.

134. *See infra* Part III.B.

135. *See infra* Part III.C.

136. *See* THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 697-716 (1970). Emerson does cite earlier, less comprehensive works: ZECHARIAH CHAFEE, JR., GOVERNMENT AND MASS COMMUNICATIONS: A REPORT FROM THE COMMISSION ON FREEDOM OF THE PRESS (1947); Ted Finman & Stewart Macaulay, *Freedom to Dissent: The Vietnam Protests and the Words of Public Officials*, 1966 WIS. L. REV. 632. *See* EMERSON, *supra*, at 698 n.1.

137. EMERSON, *supra* note 136, at 698.

138. *Id.*

139. *See id.* at 699-708.

140. *See infra* Part III.B.

> government expression hints at or threatens official reprisals against persons or groups holding views in conflict with official policy; or when the government expression arouses hostility in the community against certain opinions and thereby brings private economic and social pressures to bear on those who espouse the unpopular position.[141]

The first of these two possibilities raises the more serious problem. Government speech hinting at or threatening a reprisal may certainly suppress private speech as effectively as a statute authorizing the same sort of sanction. The second is less clear. If the government expresses disagreement with a view and the public comes to recognize the danger or foolishness of that view and refuses to deal with those expressing it, that may not be a violation of the First Amendment. After all, in that situation, the government is not really in any different position than that of any influential media figure. If, however, there is an implication to the public or other entities that they themselves may be threatened by the government if they continue to deal with the person or entity whose speech the government does not like, that raises a problem similar to the first Emerson presents.

Emerson ends up concluding that government speech is worth retaining and protecting.[142] In fact, he argues that government speech and private speech should be accorded the same level of respect and that judicial relief against government speech raises similar difficult problems.

> The argument that government officials "must be free to speak . . . without fear of criminal or civil liability," and that their right of expression "would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial," are the same arguments that justify the full protection doctrine for private expression.[143]

Professor Emerson's initial foray into the area did not ignite an immediate interest in the topic, and when Professor Mark Yudof addressed the issue almost a decade later, he still found the topic "largely ignored" in the legal literature.[144] Professor Yudof argued against the recognition of a constitutional right protecting government expression, but again, except in the case of the federal government attempting to limit a state government's expression, it would seem that government would need little protection against itself. What Yudof appears to have most in mind is legislative limits on speech by government officials and a challenge by those officials, who as individuals would have First Amendment rights, but might be lacking those rights in their official capacities.[145] In that regard, Professor Yudof argues that the legislature, rather than a court, is in the best position to determine the negatives that may attach to government

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141. EMERSON, *supra* note 136, at 699-700.

142. *Id.* at 706.

143. *Id.*

144. *See* Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 864 (1979).

145. *See id.* at 871.

communication, and that leads him to suggest against recognizing any constitutional right to such expression.[146] That, of course, is not the issue here, at least if the web lists suggested have the support, or lack the specific rejection, of the legislature. What is at issue is whether individuals have expression rights that are violated by government speech.

Turning to the effect of government speech on the expression of others, Yudof recognizes that government speech may overwhelm the speech of others, but rejects regulation on that basis because of analytic and institutional difficulties.[147] He also rejects limitations against "misleading" speech by members of the executive branch, citing Justice Jackson for the proposition that "if high level executive officers were held accountable for every misstatement or omission, government leadership on vital matters or national concern might well come to a halt."[148]

Professor Yudof's conclusion is to suggest an ultra vires approach for the courts not unlike the approach taken in dormant commerce clause cases.[149] It should be left to the legislature to set the parameters of government speech. "Courts should declare as ultra vires government speech activities that are particularly offensive and that are likely to interfere with individual judgment, unless they are specifically authorized by legislative bodies."[150] It seems unlikely that test would result in a court finding a violation in the government speech suggested here. There would not seem to be offensiveness, and it is unlikely that the web site list would interfere with individual judgment. Given advertising budgets and the ability of the video game industry to make its views known, government speech would not be so dominant as to prevent the dissemination of other views. Secondly, all that Professor Yudof would require, even if the web list were offensive and likely to interfere, is that the legislature be on board. It is, at most, an argument against unilateral executive action, not against action by the government.[151]

In an article effectively contemporaneous with Professor Yudof's, Professor

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146. *See id.*

147. *See id.* at 897-906.

148. *Id.* at 908. Professor Yudof finds his teachings from Justice Jackson in Jackson's opinion in *Wickard v. Filburn*, 317 U.S. 111, 118 (1942).

149. *See* Yudof, *supra* note 144, at 917.

150. *Id.*

151. In a more recent article, Professor Yudof recognized the need for government speech, even as a way of policy implementation.

> An effective government must communicate, provide information, publicize its rules, educate, persuade and amass public support for policies. These functions are as legitimate as providing a national defense, regulating building construction practices, providing access to medical care and social security, or delivering the mail. If there is a hallmark of modern governments, apart from their bureaucratic structure, it is their extraordinary reliance on communication as an instrument of policy.

Mark G. Yudof, *Personal Speech and Government Expression*, 38 CASE W. RES. L. REV. 671, 678 (1988) (footnotes omitted).

Steven Shiffrin added his take on government speech.[152] He began by noting that the case law did not bar even government prescription of orthodoxy, such as requirements that public school texts teach a specific point of view, although the right to dissent from that orthodoxy is protected.[153] He also pointed to a number of other government actions that require recognition that "speech financed or controlled by government plays an enormous role in the marketplace of ideas."[154] In a search for limitations, Shiffrin, like Yudof, rejects the "drowning out" approach, arguing that it lacks practicality and explanatory power.[155] While recognizing the problem of possible government domination of the marketplace of ideas, Professor Shiffrin recognizes that such domination may sometimes be quite acceptable.[156] He concludes that an "eclectic approach . . . of definitional or general balancing" is what is required.[157] In application, Professor Shiffrin would find problems if there are no rules regarding "government departure[] from electoral neutrality,"[158] although he recognizes the propriety of government communication on controversial initiative issues,[159] and clearly an office holder can state reasons why the voter should vote to return him or her rather than an opponent. Outside the electoral process, Professor Shiffrin says that the task of the eclectic approach is "to promote structures that help assure that government speech does not overwhelm individual choice."[160] Again, even in that case, he recognized that the government's speech may still be justified.[161] As with Yudof, in the context of the suggestion offered here, there is not the danger of government domination of the media that should even require the balancing suggested.[162]

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152. *See* Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565 (1980).

153. *Id.* at 567-68 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) for the protection mentioned).

154. *Id.* at 569 (pointing to government access to the mass media, the franking privilege, publication of government reports, and grants and subsides affecting communication).

155. *Id.* at 595.

156. *Id.* at 601. Later in the article, he provides the example of a military instructor not having the right to teach contrary to the commander's views, not because there is no drowning out, but because of the need for uniformity and efficiency. *See id.* at 607-08.

157. *Id.* at 610.

158. *Id.* at 655.

159. *See id.* at 637.

160. *Id.* at 655.

161. *See id.*

162. In another roughly contemporaneous article, Professor Laurence Tribe addressed the issue of government speech. He recognized that government need not remain neutral on controversial issues, while recognizing a problem where government speech "drown[s] out private communication." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-4 (1978). He also discussed, in the second edition of his book, the issue raised by the government labeling films as propaganda and found that to raise constitutional difficulties. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 809-12 (2d ed. 1988). For the courts' different view on the "propaganda" label, see *infra* notes 183-200 and accompanying text.

B. First Amendment Case Law

There have been a variety of attempts to analyze the issue of government speech in the context of developing case law. These efforts have resulted in suggested rules as varied as the government speech analysis preceding the more recent cases. One suggestion most deferential to government speech is to find a violation of First Amendment rights only when that speech constituted actual coercion.[163] Another asks whether the government's speech serves as a restraint in a particular case, but then calls for a balancing of the negative and positive effects of the government's expression.[164] Still another suggests a rule based on whether the recipient of the government's speech felt threatened, whether the intent of the government speaker was to censor, and if the censor was effective.[165] Rather than continue in an endeavor to draft general rules, this effort will turn to an examination of the cases with an eye to seeing what they say about the violent video game proposal contained herein.

The most important and the first case the video game industry or the retailers are likely to cite, in any effort to enjoin the suggested approach, is *Bantam Books, Inc. v. Sullivan*.[166] *Bantam Books* grew out of the efforts of the Rhode Island Commission to Encourage Morality in Youth.[167] The Commission's duties included educating the public regarding "obscene, indecent or impure language" and pictures in a variety of material and to recommend prosecutions regarding material tending to corrupt youth.[168] The Commission was also charged more generally with combating juvenile delinquency and encouraging morality in youth, and it had the authority to investigate, to educate the public, and to recommend legislation and prosecution.[169]

The Commission took its assigned duties seriously.

> The Commission's practice [was] to notify a distributor on official Commission stationery that certain designated books or magazines distributed by him had been reviewed by the Commission and had been declared by a majority of its members to be objectionable for sale, distribution or display to youths under 18 years of age. . . .

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163. *See* Jeffrey Brian Greenstein, *The First Amendment v. The First Amendment: The Dilemma of Inherently Competing Rights in Free Speech-Based "Constitutional Torts,"* 71 UMKC L. REV. 27, 57 (2002).

164. *See* Brian C. Castello, Note, *The Voice of Government as an Abridgment of First Amendment Rights of Speakers: Rethinking* Meese v. Keene, 1989 DUKE L.J. 654, 681-85.

165. *See* Beth Orsoff, Note, *Government Speech as Government Censorship*, 67 S. CAL. L. REV. 229, 251-54 (1993).

166. 372 U.S. 58 (1963).

167. *Id.* at 59. The members of the Commission were appointed by the Governor and served five-year terms. *Id.* at 60 n.1. They were not paid for their work, although the State did cover the expenses of the Commission. *Id.*

168. *Id.* at 59-60.

169. *Id.* at 60 n.1.

> The typical notice . . . either solicited or thanked [the distributor] in advance, for his "cooperation" with the Commission, usually reminding [the distributor] of the Commission's duty to recommend to the Attorney General prosecution of purveyors of obscenity. Copies of the lists of "objectionable" publications were circulated to local police departments, and [the distributor] was so informed in the notices.[170]

It is not surprising that the distributors took the notices seriously. The reaction of the major distributor in the state of the targeted publications was to refuse to fill any new orders for the publications in the notice, to not fill pending orders, and to order his representatives to pick up all unsold copies from the retailers to be returned to the publishers.[171] Police would usually visit the distributor, shortly after the notice was sent, and the distributor was able to demonstrate his "cooperation," but as his testimony indicated, he took actions not out of public spirit, but out of a fear of court action.[172]

The response of the major distributor had a strong negative impact on the availability in the state of the targeted books, and the books' publishers sought an injunction against the activities of the Commission.[173] The defendants contended that the body of obscenity law recognizing the fine line between the obscene and the nonobscene, and the procedural requirements attached to determining the side of the line on which material fell, did not apply to their activities "because it does not regulate or suppress obscenity but simply exhorts booksellers and advises them of their legal rights."[174]

The Court did not accept the distinction between the Commission's work and other efforts at addressing obscenity.

> This contention, premised on the Commission's want of power to apply formal legal sanctions, is untenable. It is true that appellants' books have not been seized or banned by the State, and that no one has been prosecuted for their possession or sale. But though the Commission is limited to informal sanctions–the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation–the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed "objectionable" and succeeded in its aim. We are not the first court to look through forms to the substance and recognize that informal censorship may sufficiently inhibit the circulation of publications to warrant injunctive relief.[175]

In support of that last sentence, the Court cited to cases that involved threats of prosecution or license revocation, or notices or listings by police chiefs or

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170. *Id.* at 61-63 (footnote omitted).
171. *Id.* at 63.
172. *Id.*
173. *Id.* at 61.
174. *Id.* at 66.
175. *Id.* at 66-67 (footnotes omitted).

prosecutors of supposedly obscene, or objectionable films and publications.[176] All of these instances seem to include a direct threat or the sort of implied threat of prosecution also found in this case.[177]

It is clear in the Court's remaining analysis that it is this implied threat that is the crux of the violation. As the Court noted, "[p]eople do not lightly disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around."[178] It was this threat of criminal prosecution that made the difference.

> Herein lies the vice of the system. The Commission's operation is a form of effective state regulation superimposed upon the State's criminal regulation of obscenity and making such regulation largely unnecessary. In thus obviating the need to employ criminal sanctions, the State has at the same time eliminated the safeguards of the criminal process. . . . The Commission's practice . . . provides no safeguards whatever against the suppression of nonobscene, and therefore constitutionally protected, matter. It is a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law.[179]

The Commission's work was, in the Court's view, a form of administrative prior restraint that faced the heavy, almost unbearable, burden due such systems.[180] Even though prior restraints, in the form of injunctions, may be obtained for obscene materials,[181] the sort of judicial review required for such injunctions was not present under the Commission's procedures.[182]

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176. *Id.* at 67 n.8.

177. There is also a Supreme Court case making it clear that vagueness is a problem for statutes that impose classification, particularly under a statute that allows fines and license revocation. In *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968), the Court considered the work of a classification board determining the suitability of films for children. There were fines for exhibiting such films without notice of a classification of unsuitable or for knowingly admitting a child under sixteen unaccompanied by a parent or spouse, and the potential loss of license to show such films for repeated violations of the statute. *Id.* at 680. The Court said that "[v]agueness and [its] attendant evils . . . are not rendered less objectionable because the regulation of expression is one of classification rather than direct suppression." *Id.* at 688. In a separate challenge to the same statute, the U.S. Court of Appeals for the Fifth Circuit objected to the inclusion of violent films with those involving sexual expression. *See* Interstate Circuit, Inc. v. Dallas, 366 F.2d 590 (5th Cir. 1966). The Supreme Court case stemmed from a state court decision. *See* Interstate Circuit, Inc. v. Dallas, 402 S.W.2d 770 (Tex. Ct. App. 1966), *aff'd*, 390 U.S. 676 (1968).

178. *Bantam Books, Inc.*, 372 U.S. at 68.

179. *Id.* at 69-70.

180. *Id.* at 70; *see, e.g.*, Near v. Minnesota, 283 U.S. 697 (1931).

181. *See* Kingsley Books, Inc. v. Brown, 354 U.S. 436 (1957).

182. *Bantam Books, Inc.*, 372 U.S. at 71. The Court also noted that, while the assigned focus of the Commission's work was the morality of youth, the effect of the procedures employed was also to deprive adult readers the opportunity to obtain the works listed. *See id.* There have been

The video game industry could, then, try to make out similar claims against sting/web site operations. The key difference between what was found constitutionally flawed in *Bantam Books* and what is suggested here is the lack of a criminal threat to make the effort truly coercive. It was perhaps the not so subtle threat of prosecution that made the Rhode Island Commission's operations a system of prior restraint. In the case of video games, the approach is constitutional due to the fact that selling the games to children, even if the children are below the age suggested by the industry ratings, is not illegal. The industry's thus far successful effort to keep such sales legal removes the coercive force from the publicity attendant to the operation of the sting and maintenance of the web site.

The web site is still, however, government speech that, in a sense, disparages a variety of video games and may chill sales of those games. That might be argued to be sufficient to violate the First Amendment rights of designers and manufacturers/publishers, but there are several cases that speak against this argument.

The Supreme Court addressed a somewhat analogous issue in *Meese v. Keene*.[183] *Keene* grew out of a challenge to certain aspects of the Foreign Agents

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similar later efforts specifically aimed at adult magazines. *See* Council for Periodical Distribs. Ass'n v. Evans, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd in part*, *vacated in part*, 827 F.2d 1483 (11th Cir. 1987) (vacating lower court's order on attorney's fees). There, the local district attorney employed informal means to suppress *Playboy*, *Newlook*, and *Penthouse* magazines, meeting with distributors, suggesting that the magazines may be obscene under state law, but offering a civil consent decree agreeing not to sell the magazines that could obviate the need for criminal prosecution. *Id.* at 554-57. The court had no difficulty in finding a sufficient threat in the suggestion as to be unconstitutional under *Bantam Books*. *Id.* at 562-65. Indeed, the court saw the only difference between the two cases being that the threats in the Alabama case were "less subtle" and the "threats of criminal prosecution more direct." *Id.* at 563; *see also* Bee See Books, Inc. v. Leary, 291 F. Supp. 622 (S.D.N.Y. 1968) (enjoining police commissioner's practice of continually stationing uniformed police officers in bookstore).

In what might seem a contrary case, the U.S. Court of Appeals for the First Circuit allowed a state prosecutor and state police officer to operate informally. In *State Cinema of Pittsfield, Inc. v. Ryan*, 422 F.2d 1400 (1st Cir. 1970), the court considered a request for an injunction against the prosecutor and officer from threatening arrest and prosecution for the exhibition of a particular film or the seizure of the film, should the plaintiff fail to comply with the order. The court distinguished the case from those brought against book and magazine distributors in that the advice here was private and not a notice of disapproval delivered to the public. *Id.* at 1402. Further, advice directed to a distributor was seen as unlikely to be challenged, given the large number of titles distributors carry and the marginal value of challenging advice suggesting that a few not be distributed. *Id.* The film exhibitor had the incentive to contest the advice, and the lack of a public aspect to the notice would not cut into ticket sales. *Id.* The court found a good faith attempt to enforce the state law, and it would not let the informal manner used lead to a finding of unconstitutionality without bad faith. *Id.*

183. 481 U.S. 465 (1987).

Registration Act.[184] The Act addressed, in part, the distribution of films produced by a foreign government and aimed at influencing the public regarding a political or public interest of that government.[185] Such films faced certain reporting requirements and would be classified and labeled as "political propaganda."[186] The determination of whether the film did have the aim that activates the political propaganda provisions was left to the Registration Unit of the Justice Department.[187] In *Keene*, the Registration Unit determined that three environmental films produced by the government funded National Film Board of Canada, two on acid rain and one on the perils of nuclear war, were within the scope of the provisions.[188]

The challenge was brought by an elected official in California who wished to show the films, but feared a negative public reaction to his showing foreign "political propaganda" and the negative impact that could have on his political career.[189] The Court was unswayed by the state senator's concerns, noting that the word "propaganda" has two meanings.[190] One of the meanings may be the slanted and misleading speech with which the plaintiff would not want to be associated, but it also includes fully accurate advocacy materials deserving of close attention, and both are considered proper usage.[191]

The Court refused to find any First Amendment violation.[192] The Act did not prohibit, restrain, or even burden distribution.[193] Nor did the government censure the films.[194]

> To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda. The statute does not prohibit appellee from advising his audience that the films have not been officially censured in any way. Disseminators of propaganda may go beyond the disclosures required by statute and add any further information they think germane to the public's viewing of the materials.[195]

The video game industry may argue that the case is inapposite, since the web site might well be seen as censure, rather than as simply providing information for parental use. Interestingly, this issue is addressed by another case hearing a

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184. *Id.*; 22 U.S.C. §§ 611-621 (1982).
185. *See Keene*, 481 U.S. at 469-70.
186. *Id.* at 470-71.
187. *See id.*
188. *Id.* at 468, 480-81.
189. *Id.* at 467-68.
190. *Id.* at 477.
191. *Id.* at 477-78.
192. *Id.* at 485.
193. *Id.* at 480.
194. *Id.*
195. *Id.* at 480-81 (footnotes omitted).

separate challenge to the same statute and films under review in *Keene*.

In *Block v. Meese*,[196] the U.S. Court of Appeals for the District of Columbia Circuit heard an appeal arising from a challenge brought by a distributor of the same Canadian films. While taking the same view as the Supreme Court that there is no limitation on distribution and no actual expression of government disapproval in the use of the word "propaganda," the opinion, written by now Justice Scalia,[197] goes beyond the Supreme Court's analysis to consider in some detail the result, if "propaganda" were to be considered a term of disapproval. His conclusion is that, even if the labeling were an expression of disapproval of the ideas conveyed, there is no precedent or reason to find that labeling unconstitutional.[198] "Not every governmental action which affects speech implicates the first amendment."[199]

Judge Scalia went on to address government speech that is critical of the ideas put forth by other speakers.

> We know of no case in which the first amendment has been held to be implicated by governmental action consisting of no more than governmental criticism of the speech's content. Nor does any case suggest that "uninhibited, robust, and wide-open debate" consists of debate from which the government is excluded, or an "uninhibited marketplace of ideas" one in which the government's wares cannot be advertised. . . .
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> . . . A rule excluding official praise or criticism of ideas would lead to the strange conclusion that it is permissible for the government to prohibit racial discrimination, but not to criticize racial bias; to criminalize polygamy, but not to praise the monogamous family; to make war on Hitler's Germany, but not to denounce Nazism. It is difficult to imagine how many governmental pronouncements, dating from the beginning of the Republic, would have been unconstitutional on that view of things.[200]

Indeed, the court seems correct. Many actions of government implicate and criticize the ideas of others. A presidential statement or the State of the Union Address may well criticize the ideas advocated by the other party. This official statement, as disparaging as it may be of others' political views, would not reasonably be seen as a violation of the First Amendment rights of those holding and expressing those other views. The same should be true of a congressional resolution approving of one position and disapproving of another. If critical speech by the government were a First Amendment violation, only those out of

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196. 793 F.2d 1303 (D.C. Cir. 1986).

197. Justice Scalia had gone on to the Supreme Court by the time *Meese v. Keene* reached that Court and took no part in the decision in that case. The panel for *Block v. Meese* included not only Judge Scalia, but also Judges Bork and Wright. *Id.* at 1306.

198. *Id.* at 1312.

199. *Id.* (citing Regan v. Taxation with Representation, 461 U.S. 540, 546 (1983)).

200. *Id.* at 1313.

power could engage in political debate. Their speech, alone, would be nongovernmental and not restricted by this view of the First Amendment.

Applying the reasoning of the D.C. Circuit opinion to the video game context, it may be argued that limiting government disparagement would not have the same effect on the political debate, and, thus, any disapproval expressed by a web-based list should be seen as a violation of the First Amendment rights of game designers and producers. If anything, the distinction should cut in the opposite direction. The speech examples in Judge Scalia's opinion were political speech,[201] and that sort of speech is the most protected form of speech. If members of the government can criticize Nazism, it would seem that they could also criticize games such as *Ethnic Cleansing*, in which players take on Nazi roles and carry out virtual missions that would have had Nazi approval.[202]

Government warnings about violent video games are similar to statements on public health, and even if the public health concerns have not yet been sufficiently proven as to justify bans on video games, the statements may be made in an effort to inform the public. Any web site list would still not constitute a ban, and government warnings or even disapproval fall short, in the view of the D.C. Circuit, of implicating the First Amendment rights of the video game industry or of those who would play the games.

There is also a somewhat more recent case from the D.C. Circuit that is relevant here. In *Penthouse International, Ltd. v. Meese*,[203] the court addressed an action by the Attorney General's Commission on Pornography. The procedural aspects of the case are rather convoluted. The Commission held hearings on pornography and its availability to the public.[204] Based on those hearings, it sent a letter to a number of corporations indicating that the Commission had received evidence that the corporation was involved in the distribution of pornography and saying that the Commission thought it appropriate to allow the corporation to respond before the Commission issued its report on the distributors of pornography.[205] For example, the response of Southland Corporation, the parent of the 7-Eleven chain, was to tell the Commission that they had decided to stop selling adult magazines and hoped that their name would be left out of any final report.[206]

In an earlier case, *Playboy Enterprises, Inc. v. Meese*,[207] Playboy and Penthouse sought an injunction against the publication of any "blacklist" of corporations distributing their magazines.[208] The court there decided that the

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201. *See id.*

202. For a description of the game, see *Racist Groups Using Computer Gaming to Promote Violence Against Blacks, Latinos and Jews*, ANTI-DEFAMATION LEAGUE, Feb. 19, 2002, http://www.adl.org/videogames/default.asp.

203. 939 F.2d 1011 (D.C. Cir. 1991).

204. *Id.* at 1012-13.

205. *Id.* at 1013.

206. *Id.*

207. 639 F. Supp. 581 (D.C. Cir. 1986).

208. *Id.* at 582-84.

magazines were likely to prevail on the merits of a First Amendment claim since the letters were an informal system of government censorship and a system of prior restraints, and issued a preliminary injunction.[209] The court ordered the Commission to withdraw the letters, to so inform the corporations to which they had been addressed, and to refrain from naming any corporations in the final report.[210] In a case in which the magazines might better have left well enough alone, they instead persisted in pursuing a permanent injunction, declaratory relief, and a damages action.[211] The defendants sought summary judgment on the grounds that the equitable claims were now moot and that the damages were barred by qualified immunity.[212] The district court granted the summary judgment motion,[213] and Penthouse appealed.[214]

When the D.C. Circuit considered the claim, the court seemed less hospitable to the First Amendment claims.[215] Penthouse argued that the Commission had attempted to prevent or chill the distribution of constitutionally protected magazines and that the case fit within the parameters of *Bantam Books*.[216] The court, however, found the cases to be distinguishable. In the instant case, the court found an advisory commission lacking the tie to prosecutorial power present in the *Bantam Books* case and no authority to censor.[217] The present case also lacked threats of prosecution or other indications that the Commission was trying to ban distribution.[218] Penthouse suggested that the corporations receiving the letters would think they were being threatened, but the court was not swayed.[219] The court thought the Commission may have come close to suggesting that it had more power than it, in fact, did possess, but noted that the Commission had never threatened to use the state's coercive powers against the corporations receiving the letters.[220]

Speaking more generally, and in terms that are particularly important to the issue under consideration here, the court went on to say:

> We do not see why government officials may not vigorously criticize a publication for any reason they wish. As part of the duties of their office, these officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the

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209. *Id.* at 587-88.

210. *Id.* at 588.

211. *Penthouse*, 939 F.2d at 1012.

212. *Id.*

213. Playboy Enters., Inc. v. Meese, 746 F. Supp. 154 (D.C. Cir. 1990).

214. *Penthouse*, 939 F.2d at 1011.

215. The D.C. Circuit opinion is categorized as an affirmance, but it is an affirmance of the grant of summary judgment refusing additional equitable relief and damages. *Id.* at 1020.

216. *Id.* at 1014-15.

217. *Id.* at 1015.

218. *Id.*

219. *Id.*

220. *Id.*

> statutory or even constitutional authority to regulate. If the First Amendment were thought to be violated any time a private citizen's speech or writings were criticized by a government official, those officials might be virtually immobilized.[221]

Even accepting the claims of Penthouse that the letter was a threat to blacklist the corporations distributing the magazines. The court saw the charge "with the rhetoric drawn out" as no more than a threat publicly to embarrass the corporations and that this was a perfectly legal option.[222]

> [C]orporations and other institutions are criticized by government officials for all sorts of conduct that might well be perfectly legal, including speech protected by the First Amendment. At least when the government threatens no sanction—criminal or otherwise—we very much doubt that the government's criticism or effort to embarrass . . . threatens anyone's First Amendment rights.[223]

The opinion was not unanimous in its First Amendment analysis. Judge Randolph concurred in affirming the denial of additional equitable relief and damages, but did not join fully in the First Amendment portions of the opinion.[224] Judge Randolph read the majority opinion as suggesting that the government may even make false, derogatory statements to interfere with the distribution of protected material.[225] Instead, he would draw a line between cases where the statements were true or even the result of inadvertent misstatement and intentional falsity calculated to bring about an injury to expression rights.[226]

In still another case from the D.C. Circuit, the court refused to find a constitutional violation in a situation in which an order by the Federal Communications Commission ("FCC") might have seemed to include an implied threat of license revocation directed at radio stations. *Yale Broadcasting Co. v. FCC*[227] considered an order by the FCC regarding "drug oriented" music.[228] The FCC order "remind[ed] broadcasters of a pre-existing duty, required licensees to have knowledge of the content of their programming and on the basis of this knowledge to evaluate the desirability of broadcasting music dealing with drug

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221. *Id.* at 1015-16 (citation omitted).

222. *Id.* at 1016.

223. *Id.* The court did point to one case in which it had found a violation in attempts to disrupt political activities by publishing false allegations about the targeted group. *Id.* (citing Hobson v. Wilson, 737 F.2d 1, 28 (D.C. Cir. 1984)). The court distinguished that case by noting the secret "agents provocateurs" role of the FBI agents in that case compared to what was seen as open criticism present in the instant case. *Id.*

224. *Id.* at 1020 (Randolph, J., concurring).

225. *Id.*

226. *Id.*; *but see supra* note 223.

227. 478 F.2d 594 (D.C. Cir. 1973).

228. *Id.* at 595.

use."[229] The order had stated that the FCC was not banning the play of "drug oriented" records and that there would be no reprisals against stations playing such music, but that it was still necessary for broadcasters to know the contents of what they broadcast and to make their own judgment as to the wisdom of broadcasting such music.[230]

A radio station argued that the order was a violation of its free speech rights, but the court found no such problem.[231] The task of knowing the contents of the music on the playlist was not seen as burdensome, given the FCC's suggestions as to how such knowledge could be obtained, including from listener complaints.[232] The better argument by the station owner would seem to be the implicit threat behind the order. The court noted that licensees are required to operate in the public interest and that the knowledge required in the order was necessary for the station to know if it was meeting that requirement.[233] The implication would seem to be that by playing "drug oriented" music, presumably constitutionally protected matter, the stations would be violating their public interest mandate. The court, however, said, "[f]ar from constituting any threat to freedom of speech of the licensee, we conclude that for the Commission to have been less insistent on licensees discharging their obligations would have verged

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229. *Id.*

230. *Id.* at 596. An implied threat would, of course, have made a difference. Another FCC case, this time involving television violence, provides an example. *See* Writers Guild of Am., W., Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976), *vacated*, 609 F.2d 355 (9th Cir. 1979). In the mid-1970s, pressure was asserted against broadcasters to reduce violence, play it during hours when children were less likely to be in the audience, and include warnings. *Id.* at 1099-1128. The provisions were implemented by the National Association of Broadcasters (the "Association"), against a background of a concerted effort by the FCC and members of Congress, complete with threats that should "voluntary efforts" fail, there would be legislation. *Id.* The provisions were challenged by those involved in the creative aspects of the television industry. *Id.* In the federal district court, the policy was invalidated on the ground that the Association's rules were the result of these threats and a violation of the First Amendment rights of writers, actors, directors, and producers. *Id.* at 1161. The district court opinion was vacated by the U.S. Court of Appeals for the Ninth Circuit on the grounds that the FCC had primary jurisdiction to hear the complaints. *See* Writers Guild of Am., W., Inc. v. Am. Broad. Co., 609 F.2d 355 (9th Cir. 1979). For an argument that the vacating of the opinion has led the FCC not to learn the lessons of the district court's analysis, see Robert Corn-Revere, *Television Violence and the Limits of Voluntarism*, 12 YALE J. ON REG. 187 (1995) (discussing efforts in the mid-1990s also to limit television violence).

The case does not speak to the video game proposal offered here. The FCC clearly has regulatory authority over the broadcast industry. That authority causes "suggestions" to be taken very seriously. When the prospect of legislation is added, the compulsion may reach the level of being a violation of the First Amendment. At least at this point, there is no similar regulatory authority over the video game industry.

231. *Yale Broad. Co.*, 478 F.2d at 597-99.

232. *Id.* at 600-01.

233. *Id.* at 598.

on an evasion of the Commission's own responsibilities."[234] The court pointed out that the plaintiff had recently had its license renewed, and there had been no showing of any broadcaster having failed to have a license renewed based on the order.[235] The court further noted that if there should be an unfair license denial, then legal redress would be available.[236]

This seems to be the sort of situation actually addressed by *Bantam Books*. There may be a sufficient threat that compliance is obtained and protected material is limited, without any action by a court. Only if a broadcaster is willing to risk its license to challenge the order will there be a legal determination of the constitutionality of this system of informal restraints. Yale Broadcasting moved for rehearing en banc, and although the motion was denied, Judge Bazelon did issue a statement as to why a rehearing should have been granted in recognition of the threat to the First Amendment rights of the broadcasters.

> Talk of "responsibility" of a broadcaster in this connection is simply a euphemism for self-censorship. It is an attempt to shift the onus of action against speech from the Commission to the broadcaster, but it seeks the same result—suppression of certain views and arguments. Since the imposition of the duty of such "responsibility" involves Commission compulsion to perform the function of selection and exclusion and Commission supervision of the manner in which that function is performed, the Commission still retains the ultimate power to determine what is and what is not permitted on the air.[237]

Judge Bazelon seems correct in his observations, but even here the court allowed this system of informal restraints. This may be a weakening of the case law protecting speech from such informal restraints, but even if the court would have agreed with Judge Bazelon, the case is still distinguishable from the program suggested here. The Bazelon view still rests on the power of the government to revoke or to not renew a license. No such power is available to the state in a program that lets parents know which stores and arcades make violent or sexually explicit games available to children younger than appropriate under the industry rating system.

Even government speech casting individuals in a very negative light has passed First Amendment scrutiny. In *American Family Ass'n v. City and County of San Francisco*,[238] the court considered a campaign against the advertising effort of the American Family Association. The advertisements took positions against homosexual activities, employing a Christian point of view.[239] A full page ad in the *San Francisco Chronicle* asserted that God abhors all sexual sin and that

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234. *Id.* at 599.
235. *Id.* at 602.
236. *Id.*
237. *Id.* at 605.
238. 277 F.3d 1114 (9th Cir. 2002).
239. *Id.* at 1118.

homosexuals "[make] a choice in yielding to temptation."[240] It went on to complain about the reaction to the association's and similar organizations' positions on homosexuality.[241] The groups had been labeled as bigots and homophobes and said all they wanted was a reasoned debate on the issue.[242]

The Board of Supervisors for the City and County of San Francisco wrote to the plaintiffs blaming the murder of Matthew Shepard, in part, on the messages promulgated by groups like the American Family Association.[243] The letter went on to say, "[i]t is not an exaggeration to say that there is a direct correlation between these acts of discrimination, such as when gays and lesbians are called sinful and when major religious organizations say they can change if they tried, and the horrible crimes committed against gays and lesbians."[244]

The Board also passed two resolutions. One condemned another murder of a homosexual and "call[ed] for the Religious Right to take accountability for the impact of their long-standing rhetoric denouncing gays and lesbians, which leads to a climate of mistrust and discrimination that can open the door to horrible crimes [against gays and lesbians]."[245] The second resolution addressed anti-gay television ads.[246] The resolution included the name of one of the plaintiffs, noted that "a prominent San Francisco newspaper" had accepted and published ads opposing toleration for gays and lesbians, and suggested that the "ads suggesting gays or lesbians are 'immoral and undesirable create an atmosphere which validates oppression of gays and lesbians' and encourages maltreatment of them."[247] The resolution also claimed that a marked increase in violence against gays coincides with such campaigns and called on local television stations not to air ads aimed at converting homosexuals to heterosexuality.[248]

The court's analysis was somewhat complex because the plaintiffs, instead of filing a free speech claim, filed a complaint based on the Establishment and Free Exercise Clauses of the First Amendment.[249] The free speech issue was, nonetheless, important to the Free Exercise claim.[250] Such claims must either assert that the law or practice at issue is not a general law or practice neutrally

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240. *Id.* at 1118-19.

241. *Id.* at 1119.

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.* at 1120.

248. *Id.*

249. *Id.*

250. The court found no merit in the plaintiffs' Establishment Clause claim. *Id.* at 1123. This position did, however, cause Judge Noonan to dissent. Since the case came to the court as an appeal of the grant of summary judgment to the defendants, Judge Noonan noted that the plaintiffs' allegations must be accepted as true. *Id.* at 1126 (Noonon, J., dissenting). Accepting those allegations, he felt that there was a triable issue as to whether the Board had expressed official condemnation of the plaintiffs' religious beliefs. *Id.* at 1126-27.

applied, but is instead aimed at religion, or that there is both a restriction on religious exercise and the implication of an additional constitutional right.[251] The additional constitutional right offered was the free speech right of the plaintiffs.[252] In response, the court said that the only cases in which government criticism of speech was unconstitutional were cases in which there was government conduct beyond the criticism.[253] The court refused to extend these cases and said: "We agree with the host of other circuits that recognize that public officials may criticize practices that they would have no constitutional ability to regulate, so long as there is no actual or threatened imposition of governmental power or sanction."[254] Finally, in denying the violation of free speech, the court said:

> [A]lthough the Defendants may have criticized Plaintiffs' speech (or at least the perceived effect of it) and urged television stations not to air it, there was no sanction or threat of sanction if the Plaintiffs continued to urge conversion of homosexuals or if the television stations failed to adhere to the Defendants' request and aired the advertisements.[255]

It appears, then, that government speech, when it is critical of the speech of others, may be very critical.[256] There seems to be no need to pull punches, and it would seem that the asserted correlations on which the Board's claims rested are no better established than those surrounding violent video games. That seems to imply that a web site could assert the claim that the games are detrimental to

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251. Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878-81 (1990).

252. *Am. Family Ass'n*, 277 F.3d at 1124.

253. *Id.*

254. *Id.* at 1125.

255. *Id.* Judge Noonan also dissented on this issue. As he read the complaint, Plaintiffs alleged that the television stations refused to air plaintiffs' ads in part because of the Board's resolution. *Id.* at 1127 (Noonan, J., dissenting). From this, Judge Noonan said it was a fair inference that the television stations felt some compulsion. *Id.* It is not clear that this follows from the allegation. The stations, even if they refused to air the ads in response to the resolution, may have done so because they came to see the problems caused by the ads or did so out of public concern. However, in the view of all three judges, the refusal by the television stations had to be the result of a perceived threat to raise a constitutional issue.

256. In another case involving very critical speech, *Suarez Corp. Industries v. McGraw*, 202 F.3d 676 (4th Cir. 2000), the members of the Attorney General's Office in the State of West Virginia accused the plaintiff of "cheating West Virginia residents out of their money." *Id.* at 681. The plaintiff was every bit as active in the press, taking out ads accusing the Attorney General of playing politics and wasting the State's money and time. *Id.* The Attorney General, in discussions with the Better Business Bureau ("BBB"), also indicated an unwillingness to assist the BBB in expansion, if Suarez remained a member. *Id.* at 682. The court said, "where a public official's alleged retaliation is in the nature of speech, in the absence of a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will imminently follow, such speech does not adversely affect a citizen's First Amendment rights, even if defamatory." *Id.* at 687. Finding no such threat or coercion, the court held that there was no violation of Suarez's rights. *Id.* at 689.

the well-being of youth. The holdings of various courts that the evidence is not yet strong enough to support the state's position under a strict scrutiny test does not mean that such a statement on a web site would itself be a constitutional violation. It could, of course, constitute libel, if the industry could bear the burden of proving its falsity.

The next case considered in this portion of the analysis, as a part of looking at the Second Circuit's decisions in this area, may well be the most relevant to the suggestions in this Article. That relevance comes from the fact that the case, *Hammerhead Enterprises, Inc. v. Brezenoff*,[257] also concerns a game. Hammerhead Enterprises produced the game *Public Assistance—Why Bother Working for a Living?*[258] It was a game in the style of *Monopoly* in which players moved around a board twelve times, once for each month of the year.[259] There were two routes to be taken in trying to accumulate the most money.[260] On the inside route, the "Able Bodied Welfare Recipient's Promenade," money was more easily accumulated, especially if the player landed on the "have an illegitimate child" square.[261] On the outside track, the "working person's rut," players faced obstacles in the nature of oppressive taxes, excessive regulation, and reverse discrimination.[262]

The game's developers sought publicity for their offering, appearing on *The Today Show* and *The Phil Donahue Show*.[263] The attempt at publicity also brought negative reaction, with the National Association of Women condemning the game and the Maryland NAACP's call for a boycott of stores carrying the game.[264] The criticism that led to the court action was from New York City's Administrator of the Human Resources Administration.[265] The Administrator, believing the game to be a distortion of the nature of the welfare system, saw it as his duty to express his disagreement with the view presented.[266] He did so by writing to thirteen department stores in the city, urging them not to carry the game.[267] The letter said that the game "'does a grave injustice to taxpayers and welfare clients alike'" and closed with: "'Your cooperation in keeping this game off the shelves of your stores would be a genuine public service.'"[268]

Two stores responded, both indicating that they had already decided not to stock the game.[269] The Administrator took no further action following up on the

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257. 707 F.2d 33 (2d Cir. 1983).
258. *Id.* at 34.
259. *Id.* at 34-35.
260. *Id.* at 35.
261. *Id.*
262. *Id.*
263. *Id.* at 36.
264. *Id.*
265. *Id.* at 36-37.
266. *Id.* at 36.
267. *Id.*
268. *Id.* at 37.
269. *Id.*

other letters, did not investigate stores that were carrying the game,[270] and as the court noted, his department had no regulatory power over the merchants, and the Administrator did not contact any department that did have such power.[271] The court also noted that "no credible evidence suggests that any store decided not to carry the game as a result of Brezenoff's letter."[272]

Turning to the consideration of the First Amendment claim, the court found no violation,[273] only the Administrator's "well-reasoned and sincere entreaty in support of his own political perspective" that the game should not be carried by the stores.[274] The court explained:

> The record before us, however, shows this claim to be little more than a figment of appellants' collective imagination. . . . Where comments of a government official can reasonably be interpreted as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request, a valid claim can be stated. Similarly, claimants who can demonstrate that the distribution of items containing protected speech has been deterred by official pronouncements might raise cognizable First Amendment issues. We have already noted, however, appellants cannot establish that this case involves either of these troubling situations.[275]

The court distinguished *Bantam Books* by once again noting the lack of power to impose sanctions and the lack of influence over the decision of any store.[276]

The question left by this opinion is what the result would have been if any department stores had decided not to carry the game because of the Administrator's letter. If the stores had taken such action, given the content of the letter and the lack of regulatory authority in the department, there still would not have been an intimation of punishment or regulatory action, the first factor mentioned in the last quoted language. There would, however, have been an

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270. An investigation may constitute a violation of the First Amendment. In *White v. Lee*, 227 F.3d 1214 (9th Cir. 2000), the San Francisco office of the U.S. Department of Housing and Urban Development ("HUD") conducted an investigation of three neighbors to a potential multi-family housing unit. The neighbors were concerned over the potential residents and conducted a political campaign against the project, and the HUD office investigated the campaign as an instance of housing discrimination. *Id.* at 1220-26. The Washington office of HUD eventually recognized that the neighbors had done nothing more than exercise their First Amendment rights, *id.*, and the Ninth Circuit allowed the neighbors' suit for violation of their rights to proceed. *Id.* at 1240-41.

271. *Hammerhead Enter., Inc.*, 707 F.2d at 37.

272. *Id.*

273. *Id.* at 38.

274. *Id.*

275. *Id.* at 39 (citation omitted).

276. *Id.* The plaintiffs had also suggested that the Administrator's efforts were unconstitutional because of their secret nature. *Id.* The court's response was to note that "[t]he First Amendment does not require [that] public officials to communicate only through the media." *Id.*

effect on distribution that might be said to be the result of official deterrence, the second factor. Which factor would control?

The result might be divined from the difference between the use of "a valid claim can be stated," with regard to the first factor, and "might raise a cognizable First Amendment issue[]," with regard to the second factor.[277] That is, a government speaker threatening punishment or regulatory action is sufficient to constitute a violation of the First Amendment. On the other hand, if the basis for the claim is the effect of the government's speech, that may be sufficient to raise such a claim. At least the plaintiff should have the opportunity to show that the negative distribution decision was motivated by some sense of threat arising from the government speech. Such an opportunity for the plaintiff would put the Second Circuit in line with the Ninth Circuit's *American Family Ass'n* decision and mean that it is not the effectiveness, in itself, of the government speech that makes a difference. If it is effective because it provides a convincing argument or raises social values with which the hearers agree, similar to the effect that speech by a private citizen might have, that is not a violation. If it is effective because it is from the government and implies the imposition of some form of official sanction, that is a violation of the First Amendment.

This view may be reinforced by a later Second Circuit case, *Rattner v. Netburn*.[278] In that case, Rattner, a local businessman, had been very critical of the Village of Pleasantville, New York.[279] He regularly litigated zoning disputes against the Village and claimed that the Village selectively enforced laws against him and otherwise harassed him.[280] Rattner was a member of the local Chamber of Commerce and used the Chamber's newspaper to express his views.[281] He placed an ad, formatted as an interview with him, in the paper criticizing the expenses incurred by the village in the litigation he filed.[282] In the same issue, on the front page, the Chamber published an article containing the results of a questionnaire indicating public dissatisfaction over the expenditures.[283]

In response, Netburn, a village trustee, and others involved in village government offered their own criticism of Rattner.[284] Netburn wrote the directors of the Chamber, other than Rattner, saying that the Chamber appeared to have "crossed the line between being a supportive, nonpartisan, and nonpolitical local organization to one that has a political agenda and purpose."[285] He also asked the directors whether the entire membership had supported the decision to run the article, for a list of those supporting the decision, whether the Chamber had a political purpose and, if so, what it was, and whether members were using their

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277. *Id.*
278. 930 F.2d 204 (2d Cir. 1991).
279. *Id.* at 205-06.
280. *Id.* at 205.
281. *Id.* at 205-06.
282. *Id.* at 205.
283. *Id.*
284. *Id.*
285. *Id.* at 206.

Chamber offices to support political activity.[286] The letter finished with: "I believe—and many of my neighbors believe—that the recent [issue of the paper] raises significant questions and concerns about the objectivity and trust which we are looking for from our business friends. I would appreciate a reply at your earliest convenience."[287] In response, the Chamber stopped publishing its paper, after one last scheduled issue, and it prevented Rattner from publishing anything in that last issue.[288] Rattner filed suit claiming a violation of his First Amendment rights in forcing the paper to cease publishing.[289] The district court granted summary judgment for the defendants, holding that Rattner had not shown any violation of his constitutional rights.[290]

Since the appeal was from a grant of summary judgment, the appellate court had to take all the plaintiff's allegations as true.[291] Among those allegations was one, supported by depositions of the directors of the Chamber, stating that they took Netburn's letter and other statements as threats of boycotts or of retaliatory action by the village.[292] The court held that summary judgment was improper.[293] "[T]he record, taken in the light most favorable to Rattner, reveals statements by Netburn that a reasonable factfinder could, in the words of *Hammerhead*, 'interpet[] as intimating that some form of punishment or adverse regulatory action w[ould] follow' if the [paper] continued to air Rattner's views."[294] Although the district court relied on *Hammerhead*, the Second Circuit distinguished the cases.

> [T]he district court in *Hammerhead* found that the Brezenoff letter had no coercive impact, and we noted that "not a single store was influenced by Brezenoff's correspondence." Here, in contrast, a threat was perceived and its impact was demonstrable. Several Chamber directors testified at their depositions that they viewed the letter as reminiscent of

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286. *Id.*

287. *Id.*

288. *Id.* at 206-07.

289. *Id.* at 207. *Compare* Rossignol v. Voorhaar, 316 F.3d 516 (4th Cir. 2003) (raising the issue of buying out as much of the run of a particular issue as possible rather than shutting down the operation of a paper). Sheriff's deputies went from store to store and newspaper box to newspaper box buying all the available copies of the election day edition of the local newspaper. *Id.* at 520. The paper contained articles critical of the sheriff and a candidate the sheriff supported for state's attorney. *Id.* The court found a violation of the First Amendment because some of the store clerks recognized the off-duty and out-of-uniform purchasers as deputies. *Id.* at 526. At least one clerk claimed to have been intimidated. *Id.* The operation was held to be a constitutional violation because the newspaper's expression was suppressed in reaction to its criticism of government actors, and those actors used their government status in the purchases. *Id.* at 526-27.

290. *Netburn*, 930 F.2d at 207.

291. *Id.* at 209.

292. *Id.* at 209-10.

293. *Id.* at 210.

294. *Id.* at 209.

> McCarthyism, threatening them with boycott or discriminatory enforcement of Village regulations . . . . [T]he Chamber member who had been "in charge of" the [paper] testified . . . he had actually lost business and had been harassed by the Village.[295]

The court found summary judgment improper because the above statements raised genuine issues of fact.[296]

The question again arises whether effect is sufficient or whether there must be a threat of negative official action of some sort. The court points to both as alleged; that is, there was a claim of perceived threat, and there was an effect.[297] Is the threat necessary, or will the effect suffice? Here, the case was remanded for further proceedings because "there are genuine issues of fact to be tried."[298] If effect was sufficient, there would be no real issue of fact to be tried. It was undisputed that, after Netburn's letter, the paper ceased publication and avoided any material from Rattner in its last issue scheduled. What remained unclear was the nature of Netburn's comments: Could they be taken as a threat of some retaliatory official action? That governmental coercion remains the hallmark of any violation of the First Amendment to be found in government speech seems clear.

That is not the end of the Second Circuit's analysis of this field. Eight years later the issue arose again in *X-Men Security, Inc. v. Pataki*.[299] X-Men Security had been providing security at Ocean Towers, a privately owned housing complex that received financial support from the federal and state government.[300] Ocean Towers had been quite dangerous, but when X-Men received the contract for security, safety improved rapidly.[301] A majority of the employees of X-Men were adherents of the Nation of Islam, the religious organization with which Louis Farrakan is affiliated.[302] A state legislator and U.S. Congressman criticized the award of the contract to X-Men because of their perceptions of the teachings of the Nation of Islam.[303] When the contract period expired Ocean Towers did not renew the contract with X-Men. X-Men brought a legal action claiming that the failure to renew was the result of racially and religiously biased statements by the legislators.[304]

The court refused to find the legislators liable.[305] The court noted that the legislators did not make the decision, did not have authority to supervise the

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295. *Id.* at 210 (citations omitted).
296. *Id.*
297. *Id.*
298. *Id.*
299. 196 F.3d 56 (2d Cir. 1999).
300. *Id.* at 60.
301. *Id.* at 61.
302. *Id.* at 60.
303. *Id.* at 61-62.
304. *Id.* at 62.
305. *Id.* at 72.

contracting process, and had no control over awarding or renewing the contract.[306] Although the legislators made accusations, asked for government investigations, questioned X-Men's eligibility, and advocated that the company not be retained, the court said:

> We are aware of no constitutional right on the part of plaintiffs to require legislators to refrain from such speech or advocacy.
>
> The First Amendment guarantees all persons freedom to express their views. . . .
>
> One does not lose one's right to speak upon becoming a legislator. . . .
>
> . . . The manifest function of the First Amendment in a representative government requires that legislators be given the widest latitude to express their views on issues of policy.[307]

The court could find no cases providing a right on the part of an individual to prevent a legislator from expressing his or her views.[308] While the expression of views together with threats or coercion could be a violation of the First Amendment, critical speech, even by a government speaker, is protected. Here, the critical speech was coupled with an effect, so coercion, the necessary factor in finding a violation of the First Amendment, was missing.[309]

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306. *Id.* at 68.

307. *Id.* at 69-70.

308. *Id.* at 70.

309. *Id.* at 71. In a more recent case, the Second Circuit made it clear that "a public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights even if the public-official defendant lacks direct regulatory or decisionmaking authority over the plaintiff or a third party that facilitates the plaintiff's speech." Okwedy v. Molinari, 333 F.3d 339, 340-41 (2d Cir. 2003). The court held it error to have dismissed the plaintiffs' free speech claim where a jury could find that the official's statements to a third party could be construed as threats to use official power to retaliate against the owner of billboards on which plaintiffs' messages were posted unless the owner removed the signs. *Id.* at 344. The court distinguished *X-Men* by noting that in *X-Men* there was no allegation of pressure other than disapproving speech with no allegations of threats to actual decisionmakers of any coercive or intimidating conduct. *Id.* at 343-44.

In an older billboard case, the Third Circuit refused to find a violation of speech rights in a similar request to remove billboards. R.C. Maxwell Co. v. Borough of New Hope, 735 F.2d 85, 86 (3d Cir. 1984). *R.C. Maxwell Co.* involved a historic town that had tried for several years to pass an ordinance barring billboards. *Id.* The Borough then made an informal request to the billboard owner that the billboards be removed. *Id.* The letter mentioned the proposed ordinance and the possibility of legal proceedings if the billboards remained. *Id.* The owner removed the billboards, and the entity that had been advertising on the billboards sued the Borough for violation of its First Amendment rights. *Id.* at 87. It was noted that the owner had plans to develop land in the Borough, and that while denying any quid pro quo, the owner did want to stay in the Borough's good graces. *Id.* The court, noting the owner's statements that it did not feel coerced or intimidated, found no violation. *Id.* at 87.

A web site listing stores selling games to children younger than the ratings for the game and malls with arcades allowing similar play would not contain the sort of threat or coercion required by the courts before a violation of the game makers', store owners', malls', or arcade operators' First Amendment rights may be found. The web site would be informative. If stores or malls decided that they did not like the information being disseminated and chose to change their sales policies or rental agreements, that would not violate game makers' expression rights. If the owners or operators did so, because they would have done so all along, but only now are aware of the problem, there is certainly no issue. If they change policies and practices because of concern over public reaction, that too is not a violation. The only potential violation from government speech, such as an informative web site, is if the speech contains threats or is otherwise coercive. There is no such threat or coercion to be found in the simple posting of information.

C. Due Process Issues

Assuming that the courts find no infringement of First Amendment rights in posting the results of violent video game stings on a web site, the second line of attack on the proposal is likely to be a claim that it violates due process. The program proposes simply to attempt purchases by underage buyers or attempt to play such games in arcades and then post the results. The suggested program does not include hearings or even notice to the merchant with a chance to respond. The increased costs and delays in providing such procedure might make the system too expensive to implement and the web notice could be significantly delayed.

The basis for the due process claim would be that the merchants' reputations are affected by the stigma of being listed on the web site. Fortunately, for the proposed program, such stigmatization is usually not sufficient to invoke the Due Process Clause of the Fourteenth Amendment. That result was made clear by the Supreme Court in *Paul v. Davis*.[310] Prior to that decision, however, it might have seemed that stigmatization was sufficient to invoke the Constitution's procedural guarantees.

In the earlier case, *Wisconsin v. Constantineau*,[311] the Court found unconstitutional a Wisconsin law that authorized, without notice and the opportunity to be heard, the posting of the names of persons determined to be

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The two cases might be distinguished by the fact that in the first the cause of concern was the message against homosexuals, while in the second the concern was over the billboards generally. In the second case, however, there was also a concern expressed that the ads on the billboard had nothing to do with the historic town and advertised businesses outside the community. *Id.* at 86. It was the lack of coercion in the second case that made the difference. *Id.* at 87. The court refused to find private actions that conform to civic sentiment to be coercive for purposes of finding a First Amendment violation. *Id.* at 89.

310. 424 U.S. 693, 712 (1976).

311. 400 U.S. 433 (1971).

hazardous to themselves, their families, or the community due to excessive drinking.[312] Those whose names were posted could not buy liquor or receive it as a gift, with criminal penalties possible against the seller or donor.[313] There was language in that opinion indicating that the injury to reputation caused by posting the name required the safeguards of due process. For example, the Court stated that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[314]

Paul v. Davis, at first blush, seems similar to *Constantineau*. In *Paul v. Davis*, law enforcement authorities in Kentucky sent to some 800 local merchants a flyer with the names and photos of active shoplifters.[315] Davis was included on the list, with his photo, on the basis of a shoplifting arrest and a charge that was later dismissed.[316] Davis felt that he had been stigmatized and argued that doing so without adjudicating the charge was a violation of due process.[317] The Court denied the claim and held that injury to reputation alone is never sufficient to invoke the Constitution's procedural protections.[318] The Court distinguished *Constantineau* by noting that the individual in that case also lost a right protected by state law, the right of adults to purchase or be given alcohol.[319] In *Paul v. Davis*, there was no accompanying loss, only the damage to reputation. That damage was normally the subject of a defamation action under state law, and the plaintiff was to be left to that remedy.

In *Block v. Meese*,[320] the District of Columbia Circuit recognized this rule when considering the propaganda label put on the films from the National Film Board of Canada.[321] The court said that the word "propaganda" was not

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312. *Id.* at 436-39.

313. *Id.* at 439 n.2.

314. *Id.* at 437. The Court also referred to reputation in other cases. *Id.* (citing Wisconsin v. Constantineau, 400 U.S. 433 (1971); Peters v. Hobby, 349 U.S. 331 (1955) (Douglas, J., concurring); Wieman v. Updegraff, 344 U.S. 183 (1952); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); United States v. Lovett, 328 U.S. 303 (1946)). In *Board of Regents v. Roth*, 408 U.S. 564, 573-75 (1972), the Court refused to find a right to due process in the failure to rehire a teacher on a one year contract. The Court noted that

> [t]he State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in his community.
>
> . . . Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities.

Id. at 573.

315. *Paul*, 424 U.S. at 699-95.

316. *Id.* at 695-96.

317. *Id.* at 697-98.

318. *Id.* at 706.

319. *Id.* at 708-09.

320. 793 F.2d 1303 (D.C. Cir. 1986).

321. *Id.* at 1314.

necessarily stigmatizing, but instead had a neutral reading.[322] The court went on, however, to say that even if "propaganda" were stigmatizing, "'stigmatization' alone, 'divorced from . . . effect on the legal status of an organization or person, such as the loss of a tax exemption or loss of government employment,' does not constitute a deprivation of liberty for due process purposes."[323]

Doe v. Department of Public Safety ex rel. Lee,[324] a particularly enlightening case on this issue also involving a web based list, was a challenge to Connecticut's sex offender list. Under Connecticut law, those convicted of certain offenses were required to register with the state annually, provide any changes of address, provide DNA and fingerprints, and submit to having his photo taken at least once every five years.[325] The names and addresses of registrants were placed on a web site searchable by zip code or town name.[326] Doe had been convicted of a crime that came within the scope of the statute and was required to register, but he claimed that he was not a dangerous sexual offender and posed no threat.[327] Since his name's presence on the list would indicate dangerousness, Doe argued that he had a due process right to contest in some manner his individual dangerousness.[328] The court recognized the validity of his claim, and in doing so, the court explained the requirements of due process in this area.[329]

The court in *Doe* explained the requirements that result from *Paul v. Davis*. A plaintiff complaining of defamation by the government must show

> (1) the utterance of a statement about him or her that is sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) some tangible and material state-imposed burden or alteration of his or her status or of a right in addition to the stigmatizing statement.[330]

The test was characterized as a "stigma plus" test; that is, not only must there be stigma, there must also be some other loss.[331]

Oddly, the court devoted some time to whether or not the plaintiff had been stigmatized, a seemingly easy question.[332] This is best explained by the existence of a disclaimer on the web site that the list included both dangerous and nondangerous offenders, but the court determined that the inference likely to be drawn from the list is that those listed are more likely to be dangerous than those

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322. *Id.* at 1311-12.
323. *Id.* at 1314 (quoting *Paul*, 424 U.S. at 705).
324. 271 F.3d 38 (2d Cir. 2001), *rev'd*, 538 U.S. 1 (2003).
325. *Id.* at 42-44.
326. *Id.* at 44.
327. *Id.* at 45.
328. *Id.* at 45-46.
329. *Id.* at 47.
330. *Id.*
331. *Id.*
332. *Id.* at 47-50.

in the general population.[333]

Turning to the "plus" factor, the court first noted that the additional burden must be independent of the alleged defamation.

> Most defamation plaintiffs attempt to show some sort of special damage and out-of-pocket loss which flows from the injury to their reputation. But so long as such damage flows from injury caused by the defendant to a plaintiff's reputation, it may be recoverable under state tort law but it is not recoverable in a [constitutional] action.[334]

The imposition of the plaintiff's additional burden must be "governmental in nature" in order to distinguish the case from the ordinary defamation action.[335] In *Doe*, the registration requirements constituted an adequate "plus" factor because they altered the legal status of the plaintiff and were governmental in nature since they could not be imposed by a private actor.[336] Therefore, the plaintiff was due a hearing before being placed on the list.[337] While the Supreme Court reversed the holding that a hearing was required, it did not contradict the "stigma plus" analysis. Instead, the Court noted that the statute did not require dangerousness, so a hearing was not relevant to placement on the list. It would be a "bootless exercise."[338]

The web site list proposed here would not impose anything approaching the degree of stigmatization present in *Doe*, especially if the site notes that it is not illegal for the stores to sell the games to those below the rated age or for arcades to allow similar play. Even more important, there is no "plus" factor. There is no imposition of a burden that is governmental in nature. There is no burden in the sense that no legal rights are altered. Whatever effect on legal rights may result from the posted web list is not uniquely governmental in its genesis. Although only a government actor could have required Doe to register with the State of Connecticut, anyone may run the same sort of sting suggested and post the results on a web site.

Any resulting injury to the stores or arcades listed is the sort of injury that, if the statements were false, would be the proper subject of a state law defamation action. The stigma, if there is any, is pure defamation. Any burden on business from consumers who may choose not to shop at stores that sell violent video games to those younger than the games' ratings or who choose not to frequent malls with arcades allowing such play is exactly the same sort of burden that would grow out of statements by private individuals. If a store, arcade, or mall wishes to contest its inclusion on the list, the defamation suit is the proper route; however, if the compilation is accurate, that route will be of no avail.

With regard to any defamation suit, it is important to note that the *X-Men*

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333. *Id.* at 49.

334. *Id.* at 54 (quoting Siegert v. Gilley, 500 U.S. 226, 234 (1991)).

335. *Id.* at 56.

336. *Id.* at 56-57.

337. *Id.* at 57-60.

338. Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1, 8 (2003).

court addressed the standard to be applied and held that the *New York Times* actual malice standard must be met.[339] As the Court in *New York Times* recognized, an uninhibited, robust, and open debate requires the breathing space, and the *New York Times* standard affords even erroneous statements.[340] The court in *X-Men* saw no reason not to extend this protection to statements by government officials, saying "[t]he interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators."[341]

IV. LESSONS FROM THE CASES

A. Content of the Web Site

It is clear from the cases that a governmental entity may constitutionally maintain the proposed web site listing stores and arcades, or the malls containing them, that make violent video games rated beyond the age of the children available to children. The most important aspect of the web site, other than the information on child access, is carefully to avoid any threat, explicit or implied, of state coercion. That is, there can be no hint of the imposition of governmental sanction. While there is likely to be, and indeed the aim of the list is to bring about, public pressure, that is a far cry from government sanction. The list provides information that individuals may use to focus their concerns over children and violent video games. It is not a list of merchants who may be brought into court on any sort of charges to face criminal or civil sanction.

To assure that there is no perceived threat of governmental sanction, the site should make it clear that it is legal to allow children access to the games in question. That statement of legality may, however, be accompanied by a variety of other statements. Among those statements should probably be a recount of the video games industry's ESRB rating system, noting that the ratings are not legally enforceable, and that the stores, arcades, and malls on the list are allowing children access to games the industry itself says are inappropriate.

The web site should also contain a summary of the research on the effects of violent video games on children, perhaps with links to further resources on the issue. It is true that the research has thus far not been sufficient to meet the strict scrutiny test necessary to justify legal restrictions on access by minors, but that does not mean the research is in any sense false. Even if the research were to turn out to be false, this is a matter of great public concern, and as long as the governmental unit does not know the material posted is false or have reckless disregard for its falsity, the statements are protected from any recovery for

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339. X-Men Sec., Inc. v. Pataki, 196 F.3d 56, 69-70 (2d Cir. 1999) (citing New York Times Co. v. Sullivan, 376 U.S. 254, 271-72 (1964) (requiring that public official plaintiffs in a libel suit demonstrate actual malice on the part of the defendants, meaning that the defendants knew the statements made were false or had a reckless disregard for truth or falsity)).

340. *New York Times*, 376 U.S. at 271-72.

341. *X-Men Sec., Inc.*, 196 F.3d at 70 (quoting Bond v. Floyd, 385 U.S. 116, 135-36 (1966)).

libel.[342] Nor is there any need for an exaggerated sense of fairness to the other side of the debate.[343] Not only is the health and psychological community rather united in its position on the issue; it is clear that a governmental entity may state its own position on an issue without providing a vehicle for presentation of alternative views as long as it employs a communication channel that is restricted solely to government use rather than a public forum.[344]

The government may state its belief based on scientific research that playing these games is harmful to children. Such a message would be similar to public health messages that the government conveys in a variety of contexts, such as the effects of high fat or high sugar foods on children or lack of exercise and sleep. Again, the government must be careful to avoid any perceived threat to parents. Not only do parents have a constitutional right to determine the material to which their children are exposed, at least in certain contexts,[345] any threat to parents resulting in pressure on stores, arcades, and malls could be construed as governmental pressure and a potential violation of the First Amendment rights of the providers. That is, although the government may constitutionally provide information from which parents and others may select the targets for their concerns over children and violent video games, any state coercion behind the public pressure can be a constitutional problem.

B. Concerns Over a "Ratings Creep"

There are already those who are unhappy with the industry ratings and believe that some teen rated games should be rated for mature players.[346] The use of ratings suggested here may lead to a "ratings creep" in which games that formerly would have been rated M would be rated T, allowing the games to be bought or played without the retailer or arcade operator being placed on the offender list. Alternatively, the ESRB could simply go out of business. The ESRB could take the position that it provided ratings as a tool for parents, but if government is going to use the ratings to bring public pressure against those who provide the games to children, it would simply prefer not to provide the government the standard to be used.

In this regard, it is important to note that there is nothing in the case law examined, or in the analyses of those cases, requiring that the industry's own rating system provide the basis for inclusion on the web site list. A third party system or even a government rating could instead be used. A public interest

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342. *See supra* notes 339-41 and accompanying text.

343. *See, e.g.*, *supra* notes 44-51, 55 and accompanying text.

344. *See* Kidwell v. City of Union, 462 F.3d 620, 624 (6th Cir. 2006) (finding no First Amendment violation in City's expenditure of funds to oppose citizen initiative), *cert. denied*, 127 S. Ct. 2258 (2007).

345. *See, e.g.*, Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534-35 (1925) (recognizing "liberty of parents and guardians to direct the upbringing and education of children") (citing Meyer v. Nebraska, 262 U.S. 390 (1923))).

346. *See supra* notes 112-14 and accompanying text.

group could enlist psychologists to rate games. The government could not require that publishers submit the games prior to their release, but there is no prohibition against any entity, government or private, buying the game, playing it, and providing its own rating as to suitability for various ages.

To be fair to retailers, arcades, and mall operators, it should be clear to all what ages are seen as proper for each game under any nonindustry rating system. The best solution may be to invite the publishers of games rated as appropriate for a particular age to display the rating symbol of the group doing the rating. The public could then be informed when a retailer or arcade operator made available to children games rated by the alternative system as inappropriate for the children's ages. The effect would place the same public pressure on game producers to submit their games by the nonindustry evaluators for rating; but again, rating would not be legally mandated, and public pressure would not constitute a constitutional violation.

Presumably, the industry would prefer to maintain control of the rating system. Although the industry or a still existent ESRB might choose to stretch the categories, it would likely not want to do so to the point of breaking. If industry did stretch or abandon the system, the sting and web site list approach advocated here can continue to operate without the industry's cooperation.

TINKER AND STUDENT FREE SPEECH RIGHTS: A FUNCTIONALIST ALTERNATIVE

R. GEORGE WRIGHT*

INTRODUCTION

Public schools are the sites of both education and distraction from education. While education can take many forms, so can distraction, including various forms of student speech. Distracting student speech is an important category that is nearly unrecognized by the law. Let us set aside student speech that causes or threatens disruption in the sense of an overt disturbance. Let us also set aside speech that unjustifiably violates the recognized legal rights of other persons. Finally, let us set aside speech thought to be lewd, vulgar, or plainly offensive and speech that could suggest official school endorsement. Each of these categories of student speech is addressed by a growing body of First Amendment case law. We are then left with various forms of independent student speech with either quite limited or potentially great value, but also with the potential, under some circumstances, to cause distraction.

Such distraction of and by students might be either superficial or deep and severe, emotionally disturbing or undisturbing, transient or chronic, limited in scope or school-wide. The distractions may or may not be closely linked with the intended message, if any, of the speech. Distraction itself may or may not be either intended or predicted. Some distractions could be thought of as consented to by those distracted, including cases of a speaker's own self-distracting speech. There seems to be some sense in which a distraction can be voluntarily encountered, yet still count as a distraction. But there are no guarantees that students and school authorities will always agree on when students are being distracted. We may not recognize that we are being distracted. Students and educators may, after all, disagree on students' goals and priorities.

Some distractions are relatively easy to avoid or minimize; others much less so. Some distractions are discreet; others obtrusive. Sometimes, speakers may reciprocally distract one another, as in various forms of merely idle conversation. Relatedly, some distractions amount to group-distractions. Distraction is, in a sense, a matter of degree. Many distractions seem more, or less, compatible with simultaneously performing other activities, as in real or alleged multi-tasking. Speech distraction may or may not involve technology. Some persons may be especially easily or severely distractable.

The seriousness of a speech distraction should take into account not only the degree—the intensity and duration, for example, of the distraction—but the difference in value between what is accomplished under distraction, and what might have been accomplished if one had avoided the distraction. In other words, distraction at important moments may matter more. We may think of a public school as always involving some minimal "baseline" level of distraction, and this distraction itself may have some sort of minimal positive social value.

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We cannot offer examples of all of the common forms of student speech that causes distraction. Purely for the sake of vividness in what follows, let us imagine an exceptionally distracted classroom in which the distractions are largely unobtrusive, ongoing, more or less voluntary, and which leave the distracted persons at least minimally capable of following along with and participating in official classroom activities and assignments.

More concretely, let us imagine technology-based distractions involving text-messages, Blackberries®, i-Pods®, video or camera cell phones, or laptop screen images involving some combination of class material, e-mail, chat room discussions, video and other entertainment, and commercial ads. The age of the students involved may be varied as thought relevant.

We may assume that each of the potentially distracted students is silent in their own distraction, and silent and physically unobtrusive insofar as they may be in distracting others. We may further assume that each student would, if called upon in class, be able to offer some sort of verbal response within the broad range of what could be thought normal in a classroom setting.

At some point, no doubt, distraction could be transformed into disruption, disturbance, or disorder. But this would then be amenable to school response under well-established law and outside the scope of our concern. It might also be possible to imagine an unwaivable right of all individual students to an education subject to only some minimum degree of voluntary or involuntary distraction. A student's consent to be distracted would be of no legal effect, and the distracted student could then conceivably sue for violation of her non-distraction rights. But it would be simpler and more straightforward to adopt what we herein call a functionalist approach, in which we consider student speech distractions in context and in light of the essential purposes and missions of public schools in the first place.

This is of course not to suggest that all distracting student speech should be constitutionally subject to restriction. That would clearly involve monumental overkill. For one thing, developing the ability to filter out environmental distractions, including the speech, symbolic or otherwise, of one's fellow students is itself an increasingly important dimension of one's overall education. For another, some independent student speech is both distracting and yet clearly worth protecting for its free speech or civic educational value. Student speech can be both distracting and constitutionally or pedagogically valuable.

Let us then briefly consider some of the surrounding student speech case law. Notably, there is an important gap in the area of distracting speech. However well or poorly such law may address disruption, disturbance, disorder, and recognized rights-violations, the law does not meaningfully address the various sorts of potentially distracting student speech briefly hinted at above. The crucial problem is that independent and unsponsored student speech can be clearly distracting to one degree or another and yet equally clearly fail to rise to the level of inviting disruption, disturbance, disorder, or violation of recognized rights. But the broad phenomenon of speech distraction can, in some respects, be meaningfully associated with a broad process of impairment of a school's essential educational and civic missions. Distracting student speech sometimes will and sometimes will not be worth constitutionally protecting. At least some

sort of judicial recognition of this is called for.

The most crucial case for our purposes is *Tinker v. Des Moines Independent Community School District*.[1] *Tinker* can be thought of as a triumph of the free speech rights of public school students. *Tinker* recognized students' rights to wear symbolic black armbands in public schools in protest of administration policy in pursuing the Vietnam War.[2] *Tinker*'s holding focuses not on distraction, but on actual or potential disruption, disturbance, disorder, or violation of the rights of others. Necessarily, as a matter of sheer holding and dicta, *Tinker* can have little to say about merely distracting speech, especially when the student speech in question does not address any public issue potentially facing the school or any broader community.

The Supreme Court has revisited the question of public school student speech rights on two occasions, in *Bethel School District No. 403 v. Fraser*[3] and *Hazelwood School District v. Kuhlmeier*.[4] Both *Fraser* and *Hazelwood* place significant, if not entirely clear, limits on student speech.[5] The circumstances in

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1. 393 U.S. 503 (1969). For commentary on *Tinker*, see, e.g., Akhil Reed Amar, *A Tale of Three Wars:* Tinker *in Constitutional Context*, 48 DRAKE L. REV. 507, 517-18 (2000) (discussing *Tinker* as evoking not only First Amendment concerns, but equality and inclusion themes of the Fourteenth Amendment as well); Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 528 (2000) ("Over the three decades of the Burger and Rehnquist Courts, there have been virtually no decisions protecting rights of students in schools."); Amy Gutmann, *What Is the Value of Free Speech for Students?*, 29 ARIZ. ST. L.J. 519, 523 (1997) ("[L]aws governing free speech in schools should increasingly respect the free speech rights of students varied by age. To the extent that educators and laws fail to cede more freedom to students as they mature, they fail to prepare students for living the lives of democratic citizens."); Mark Yudoff, Tinker *Tailored: Good Faith, Civility, and Student Expression*, 69 ST. JOHN'S L. REV. 365, 370 (1995) (noting the possibility of broad as well as narrow understandings of the educational mission and the importance of civility as a basic ground rule). While *Tinker* is often applied to very young students, some courts occasionally attempt to draw meaningful limits. *See, e.g.*, S.G. *ex rel.* A.G. v. Sayreville Bd. of Educ., 333 F.3d 417, 423 (3d Cir. 2003) (stating that a five-year-old kindergarten student at recess verbally "threatening" to shoot fellow student was not engaging in expressive speech).

2. *Tinker*, 393 U.S. at 504.

3. 478 U.S. 675 (1986).

4. 484 U.S. 260 (1988).

5. For some important issues left unclear under *Hazelwood*, see R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L.J. 175, 178-90 (2007). For some unclear issues under *Fraser*, compare *Boroff v. Van Wert City Board of Education*, 220 F.3d 465, 469-70 (6th Cir. 2000), with *Frederick v. Morse*, 439 F.3d 1114, 1122-23 (9th Cir. 2006), *rev'd*, 127 S. Ct. 2618 (2007) and *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 328-29 (2d Cir. 2006) (discussing whether *Fraser* can extend to all independent student speech inconsistent with the school's basic educational mission, beyond the narrower vulgar and offensive-language speech in a school assembly context in *Fraser*), *cert. denied*, 127 S. Ct. 3054 (2007). *See also* Newsom *ex rel.* Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 256 (4th Cir. 2003) (limiting *Fraser* to regulating the form or manner of lewd, vulgar, plainly offensive speech, but

Fraser were complex and distinctive. It is difficult to see the practical point of *Fraser* if the speech and reaction in *Fraser* already amounted to prohibitable disruption or disorder under *Tinker*. The *Tinker* Court did not protect any speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[6] These limits are expressed repeatedly within *Tinker*.[7] But there is also a sense in which these limits are left largely unexplored and unclarified within *Tinker*, and even later within *Fraser* and *Hazelwood*. It is only recently that the lower courts have even consciously taken to clarifying, sometimes in controversial ways, limits to student speech rights that were at best implicitly recognized or left unconsidered in *Tinker*.[8]

This Article takes the ongoing judicial exploration of the proper scope of the limits on student speech rights imposed by *Tinker* and its progeny as an opportunity to more broadly reassess the logic of *Tinker* and ensuing cases on students' right to free speech. An alternative, functionalist approach to student speech rights is raised herein. A functionalist approach begins with the widely recognized basic missions and purposes of public schools. A functionalist approach then emphasizes the presumably expert judgments of local school authorities as to how best to promote the basic civic and educational functions of the public schools, including, but hardly limited to, the importance of reducing distractions therefrom. A functionalist approach appropriately recognizes and protects student speech, even in many instances of distracting speech. However, a functionalist approach emphasizes that schools serve vital educational and civic purposes in addition to being fora for student expression.

This Article emphasizes schools' institutional functions and purposes more than the *Tinker* Court. Perhaps the most widely cited language from *Tinker*, implicitly setting its tone, is the Court's opening assertion that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[9] We should not read too much into this rhetorical language. However, it is possible that the *Tinker* majority may hereby implicitly assume a baseline for free speech rights consisting of public non-school environments, including the speech protected in classic, uninhibited, and robust public debate cases such as *Terminiello v. City of Chicago*.[10] It is literally from such an assumed background that students

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perhaps not the speech's "content").

6. *Tinker*, 393 U.S. at 513. For whatever light it may shed on the matter, "disorderly" conduct has been defined as "[b]ehavior that tends to disturb the public peace, offend public morals, or undermine public safety." BLACK'S LAW DICTIONARY 292 (7th ed. 1999) (defining "disorderly conduct"). Mere distraction would most typically fall outside these limits.

7. *Tinker*, 393 U.S. at 509, 513, 514.

8. *See, e.g.*, Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir.), *reh'g en banc denied*, 455 F.3d 1052 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007).

9. *Tinker*, 393 U.S. at 506. A Westlaw search of the ALLCASES database undertaken February 6, 2007, with the query "shed their constitutional rights" /s "schoolhouse gate" yielded the substantial total of 301 distinct quoting cases. This search omitted close paraphrases.

10. 337 U.S. 1, 4 (1949) (stating that dispute, dissatisfaction, unrest, and anger are anticipated

emerge, with their free speech rights modified, but not shed, in the context of the public school.

This familiar *Tinker* approach, however natural, is not the only reasonable approach. It is open to functionalist critique. We can instead approach the question of student speech by first asking, in an equally legitimate way, about the most important purposes and missions of public schools. We can ask specifically about the variety of constitutionally permissible approaches a school might fairly choose to explore in seeking to better discharge the totality of its widely recognized basic pedagogical and civic responsibilities. These responsibilities will certainly include broad "training" and practice in the independent exercise of free speech. But this hardly exhausts the crucial missions of public schools. Student speech that tends to distract other students can, in appropriate cases, be a legitimate focus of reasonable regulation for the sake of better promoting the school's varied basic missions and purposes.

Thus, our focus is not on validating *Tinker* as a whole or on calling for its broad overruling. Nor do we need to interpret *Tinker*'s rights-violation or disorderliness-based exceptions either narrowly or broadly.[11] Our focus is instead on public schools as institutions with multiple and complex vital civic and educational missions. Individual public schools should be permitted reasonable experimental latitude in fairly regulating student speech that causes distraction in order to better discharge the school's overall educational and community responsibilities.

The upshot of the argument is this: within appropriate limits, a public school that seeks to advance the overall mission of the school in a broadly egalitarian democracy should be allowed to fairly and even-handedly make such an attempt, even at the expense of some student speech rights apparently protected under *Tinker*. We reach this result whether we construe *Tinker*'s built-in[12] and extrinsic[13] limitations either narrowly or broadly. Whatever its value as free speech, student speech that tends to distract may also tend to impair a school's pursuit of its basic educational and civic goals, and thus may become subject to reasonable and even-handed regulation without violating *Tinker*.

I. INTRODUCING THE PROBLEM OF DISTRACTION: *HARPER V. POWAY*

A recent controversial case explicitly focuses, admittedly, not on the idea of distracting speech, but on possible rights-violations by student speakers. *Harper ex rel. Harper v. Poway Unified School District* is useful for illustrating some limits of *Tinker*'s focus on disorder and disruption as well as rights-violation as justification for regulating student speech.[14] *Harper* involved a public high

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results of public political debate).

11. *See Tinker*, 393 U.S. at 509, 513, 514.

12. *See id.*

13. *See supra* notes 3-5 and accompanying text.

14. 445 F.3d 1166 (9th Cir.), *reh'g en banc denied*, 455 F.3d 1052 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007). In connection with the en banc level review, see the opinions of

school sophomore, Harper, who wore t-shirts to school with hand-lettered messages on the front and back. The front of one such shirt bore the message: "'BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED.'"[15] The front of another read: "'I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED.'"[16] Apparently on both of the school days in question, the handwritten message on the back was: "'HOMOSEXUALITY IS SHAMEFUL "Romans 1:37."'"[17] On the second such day, "Harper's second period teacher . . . noticed Harper's shirt and observed 'several students off-task talking about' the shirt."[18]

In addressing Harper's interlocutory appeal from the trial court's denial of his motion for a preliminary injunction regarding any possible suspension, the Ninth Circuit focused its analysis on the *Tinker* case when determining any likelihood of success on the merits.[19] The Ninth Circuit interestingly did not focus on the first *Tinker* prong: the possibility that the school might reasonably have predicted substantial disruption, disorder, or similarly disturbing interference with educational activity and mission.[20] Instead, the court focused on the second *Tinker* prong, or on the possibility under *Tinker* of regulating student speech that violates the relevant rights of other students.[21]

Judge Reinhardt, *Harper*, 455 F.3d at 1052 (Reinhardt, J., concurring), and Judge O'Scannlain, *id.* at 1054-55 (O'Scannlain, J., dissenting).

15. *Harper*, 445 F.3d at 1170-71.

16. *Id.* at 1171.

17. *Id.*

18. *Id.* While the explicit reference to students being, at least briefly, "off-task" might have served as a cue to consider the role of distraction and distracting speech in public schools, the court unfortunately, but unsurprisingly, did not pursue this possibility.

19. *See id.* at 1175 (citing Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)). *Harper* raised a number of separate constitutional claims, *see id.* at 1173, but this Article's focus is solely on the free speech claims.

20. *See id.* at 1174. Doubtless, if distracting speech, especially if unwelcome, is carried beyond some extreme point, the distracting speech could become not only extremely distracting, but physically disruptive or provocative of the altercations and physical confrontations contemplated by the disruption or disorder prong in *Tinker*. For discussion of disorderliness under *Tinker*, see, e.g., *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243, 252-58 (3d Cir. 2002). Analogously, speech that is extremely distracting over a period of time might also be thought to thereby violate some recognized relevant sorts of rights of one or more distracted students. We prefer herein to focus directly on a school's essential mission, without the separate analytical step in which a school's failure to advance its mission also violates the sufficient individual rights, however defined, of identifiable students. Anyone who sees value in taking this further analytical step is certainly welcome to argue on behalf of doing so. A focus on rights-violation is sensible in many cases in which distraction is not the central issue and in which an individual rights-violation analysis can be easily conducted.

21. *See Harper*, 445 F.3d at 1175 (citing *Tinker*, 393 U.S. at 508). The *Harper* court set aside not only the disruption or disorder prong under *Tinker*, but the possibility as well of restricting the speech as plainly offensive under *Fraser*. *See id.* at 1176, 1177 n.14.

Harper focused in particular on the language in *Tinker* that permits regulating student speech that violates "'the rights of other students to be secure and to be let alone.'"[22] The *Harper* court stated more specifically that "[p]ublic school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses."[23] Injury, assault, and security are not confined to the realm of the physical and tangible. The *Harper* court emphasized that "[b]eing secure involves not only freedom from physical assaults but from psychological attacks that cause young people to question their self-worth and their rightful place in society."[24] The court explained:

> Speech that attacks high school students who are members of minority groups that have historically been oppressed, subjected to verbal and physical abuse, and made to feel inferior, serves to injure and intimidate them, as well as to damage their sense of security and interfere with their opportunity to learn.[25]

The court expressly set aside questions of the status in this context of gender categories[26] and confined its holding to targeted students who are "particularly vulnerable"[27] or of "minority status"[28] with respect to "core characteristic"[29] attributes, including "race, religion, and sexual orientation."[30] Sensibly, the court observed that "[t]here is . . . a difference between a historically oppressed minority group that has been the victim of serious prejudice and discrimination and a group that has always enjoyed a preferred social, economic and political status."[31]

Courts could limit or extend the logic of *Harper* in various ways. The focus,

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22. *Id.* at 1177 (quoting *Tinker*, 393 U.S. at 508).

23. *Id.* at 1178.

24. *Id.*

25. *Id.* Note here not only the court's focus on the minority or historically oppressed status of the target of the speech, but also the emphasis on an individual right to an unimpaired education, while still setting aside the *Tinker* prong that encompasses genuinely disruptive and physically disorderly interference with the school's educational mission. *See supra* notes 6, 7, 9 and accompanying text; *see also Harper*, 445 F.3d at 1180 ("[T]he School had a valid and lawful basis for restricting Harper's wearing of his T-shirt on the ground that his conduct was injurious to gay and lesbian students and interfered with their right to learn.").

26. *See Harper*, 445 F.3d at 1183 n.28.

27. *Id.* at 1182.

28. *Id.* at 1183.

29. *Id.* at 1182.

30. *Id.* at 1183.

31. *Id.* at 1183 n.28; *see also* Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 455 F.3d 1052, 1052-54 (9th Cir. 2006) (Reinhardt, J., concurring), *vacated as moot*, 127 S. Ct. 1484 (2007). Of course, these two general historical classifications may not be entirely exhaustive. For a sense of Judge Reinhardt's approach to other elements of *Tinker*, see *LaVine ex rel. LaVine v. Blaine School District*, 279 F.3d 719, 726 (9th Cir. 2002).

however, would still be on rights, of one sort or another, of one weight or another, as held by individual students or by more or less identifiable groups of students. Any number of questions would, as the court recognizes, inevitably arise. Further refinement of the *Harper* theory would certainly be required, likely at the price of additional complexity, and perhaps additional controversy.

Merely to illustrate a few of the *Harper* complications, consider the question, noted by the *Harper* court, of gender classifications.[32] Gender certainly seems to commonly qualify as a "core characteristic"[33] in defining identity and vulnerability. But what if gender did not for some reason count as a "core characteristic"? Would any burdening on the basis of gender for that reason somehow count as a less serious problem in the school speech context? Or could we say that the right in question could never be violated by speech that does not evoke or address a "core characteristic"?

At some point, a court applying *Harper*, perhaps in the context of gender or elsewhere, would have to decide on the relative importance of historical relationships, over some specified time frame, and present vulnerabilities. Female students are doubtless disproportionately subject to verbal targeting in public schools. Should this targeting suffice to evoke rights protection and speech regulation under *Harper*, or should evidence of some further adverse effect on women's educational achievement, causally attributable to such verbal targeting, also be required? In contrast, we might ask whether "religion" should always count as a "core characteristic." Often, religious and other forms of identity can be characterizable in various complex ways, some perhaps associated with past or present minority status, and others not.

A court could also, in a variety of cases, look in a "formalistic" way to the express language of the verbal targeting. But some language may have an impact on its target beyond its literal meaning. And will courts handle "ironic" or insincere language well? Should the courts then attempt to look more to evidence of actual impact on educational achievement, as costly and difficult as that might be to rigorously sort out? Can we assess the impact on target-group members without also taking into consideration how the speaker reasonably conceives of him or herself, the intended message or purpose of the speech, and how he or she is in turn conceived of and identified by the speech targets?

If historically dominant groups are, by the sensible logic of *Harper*, subject to its unique prohibitions but not its unique protections, the *Harper* rule, however otherwise justifiable, may be in tension with current Supreme Court's sentiment for applying similar equal protection tests for historically dominant and subordinated groups alike.[34] Even after *Harper*, members of dominant groups who are targeted by speech are not without some redress, typically through credible threats of altercations and disorder under the alternative *Tinker*

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32. *See Harper*, 445 F.3d at 1183 n.28.

33. *See id.* at 1182.

34. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 326 (2003); Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

"disruption" prong,[35] despite the general disfavoring in free speech law of a "heckler's veto."[36]

Under *Harper*, we can expect good faith debates to evolve, not only over group identification and status, but over what sorts of messages will count as an attack or verbal assault sufficient to evoke the *Harper* rights analysis.[37] Will inadvertent injury suffice where a speaker's claimed motive was merely one of unselfconscious group pride or some allegedly innocent or healthy form of group assertion? How far will subtleties of recent school history, context, or local cultural understanding transform a literally innocent message? What if the target-group's interpretation, let alone its reaction, is itself mixed and to one degree or another either ambivalent or indifferent? Could such mixed reaction mean that we have misidentified the target group?

Suppose we start with student speech that is judged to be unprotected under *Harper*. For purposes of this Article, we again certainly need have no objection to *Harper*. But judicially finding an instance of speech unprotected under *Harper* could trigger a process of responsive move and countermove at a level of subtlety that may test the courts. Why could not dominant groups then seek to determine how close to the legally established limit they can come? Language could then become more subtle, more ironic, more non-referential, vaguer, more implicit, or more "coded," and perhaps this would be a good thing. But the "sting" and intended hurtfulness of language need not be a function of only literal reference and meaning. Ambiguity and sarcasm can send a message of severe and continuing contempt with a greater chance of judicial protection. A change in speaker identity can arguably change the valence of the language from camaraderie to insult.

Such hypothetical cases are, under the *Harper* analysis, inevitably difficult, however they might eventually be adjudicated. Again, our point is not to suggest how such cases should come out. Our own functionalist approach, emphasizing questions of distraction, will sometimes raise some similar, if not overlapping, complications, though not as directly in a group-right adversarial setting. We focus, in contrast, less on the complex rights-violation analysis required by *Harper* and more on administrators' reasonable perceptions of distraction through student speech or of students' being substantially "off-task" in ways that fail to promote schools' crucial educational mission.[38] The focus in such cases

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35. *See Harper*, 445 F.3d at 1175 (referring to the *Tinker* disruption or disorder prong).

36. *See, e.g.*, Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (disfavoring the threat or likelihood of disruption by the speaker's opponents as sufficient grounds to censor the speaker).

37. *See supra* text accompanying notes 23-25.

38. *See supra* text accompanying notes 23-25. The *Harper* court, following language in *Hazelwood*, urged that "'[a] school need not tolerate student speech that is inconsistent with its basic educational mission.'" 445 F.3d at 1185 (quoting Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988)). *Hazelwood* involved not the speech of clearly independent students, but of students who could reasonably be perceived as speaking with the school's approval. *Hazelwood*, 484 U.S. at 270-71. *Harper* reads this as permitting schools to validate basic civic values such as tolerance and equality, as distinct from bigotry or hatred, rather than as a distinct concern for

will be less directly on adversarial, often zero-sum, group-rights adjudication.

Speech that is less overtly challenging than that in *Harper*, and thus a more difficult case under *Harper*, may in some cases actually be just as distracting, if not more distracting, than some instances of a plainer verbal attack. Distraction can take various forms, including students' anxious and active uncertainty in class as to the meaning of ambiguous language. The meaning of the underlying speech may be unclear or controversial. But the resulting degree of distraction, partly in the form of a detectable student conversational "buzz," may actually be relatively easy for school officials to ascertain and to document, at least through accumulated verbal reports.

The *Harper* rights-focus has the undoubted virtue of attempting to best protect those who deserve the most protection. But *Harper*'s scope, in itself and even in the context of the broader speech regulation permitted by *Tinker*, is actually relatively narrow. *Harper*, even in conjunction with the remainder of *Tinker*, does not attempt to address the largely distinct and much broader problem of speech that causes distraction from the school's educational mission.[39] Far from violating rights in the *Harper* sense, for example, the most distracting speech may be most welcomed by those distracted.

The dissenting opinion in *Harper*, authored by Judge Kozinski,[40] takes issue with Judge Reinhardt's opinion for the court on a number of issues of free speech.[41] But Judge Kozinski seems, for purposes of his free speech analysis, even less interested than the majority in questions of distraction and educational mission. Judge Kozinski thus merely observes, uncontroversially, that "it is not unusual in a high school classroom for students to be 'off-task.'"[42] Thus, the scene of "students bored or distracted in class is a cliché."[43]

From our perspective, though, that classroom distraction is indeed a cliché may justify more, rather than less, official attention to such distraction, even when valuable student speech is the source of the distraction. The argument is

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distraction from education. *See Harper*, 445 F.3d at 1185.

39. *See Harper*, 445 F.3d 1185-86.

40. *Id.* at 1192 (Kozinski, J., dissenting).

41. *See, e.g.*, *id.* at 1198 ("The 'rights of others' language in *Tinker* can only refer to traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established . . . . Otherwise, a state legislature could effectively overrule *Tinker* by granting students an affirmative right not to be offended."). On the merits, it is unclear why the relevant rights under *Tinker* must be traditional, above and beyond being sufficiently important. It would seem that the *Harper* majority is at least seeking to narrow the scope of the relevant rights so that more than mere offense is required. *See, e.g.*, *id.* at 1180 n.21, 1182 (majority opinion) (noting that mere offense insufficient; possibility of "significant injury" required). For further debate, see the contrasting opinions of Judges Reinhardt, *Harper ex rel. Harper v. Poway Unified School District*, 455 F.3d 1052, 1052 (9th Cir. 2006) (Reinhardt, J., concurring), *vacated as moot*, 127 S. Ct. 1484 (2007), and O'Scannlain, *id.* at 1054 (O'Scannlain, J., dissenting), in a denial of a petition for rehearing.

42. *Harper*, 455 F.3d at 1193 (Kozinski, J., dissenting).

43. *Id.* at 1193-94.

not that briefly distracting speech in any particular case causes lasting or substantial harm. Nor is the argument that distracting speech within schools is the primary cause of any undesirable educational or cultural outcome. The broader culture, apart from school, promotes distractability and also distracts students. In-school speech among students is thus hardly the only source of student distraction. Specific and rigorous causal proof of any claim, positive or negative, in this area is probably impossible. Instead, a key point is that distracting student speech within schools is generally speech that, whatever its value otherwise, fails to promote or impairs fulfillment of one or more basic educational mission and purpose.

In-school speech among students that can reasonably be said to distract, and thus in some respect fail to promote or to impair the purposes for which public schools exist, may in some cases not qualify for distinctive protection under the free speech clause. Some distracting speech may be otherwise sufficiently valuable and promotive of basic educational or civic goals as to deserve free speech protection. There will be some close cases. But this course allows us to bypass much of the controversy and the rights-focused interpretive issues raised by the *Harper* case. More generally, a contrary focus on utter disruption or disturbance, even combined with *Harper*'s focus on particular rights-violations, leaves merely distracting speech completely unexamined.

In *Harper*-type cases, debate may focus, for example, on whether some instance of student speech was "merely" offensive to some students and thus protected, or whether a violation of a sufficient right held by particular targeted students can be shown as well. The distinction between various kinds of offensive speech and various kinds of speech harmful to other persons would often be crucial to a *Harper*-type analysis, but this distinction is, among the experts, notoriously difficult to consensually draw and to justify.[44]

Distracting speech may be merely entertaining or a matter of indifference to

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44. For discussion, see Richard A. Posner, *On Liberty: A Revaluation*, *in* ON LIBERTY 197, 202 (David Bromwich & George Kateb eds., 2003); Michael S. Moore, *Freedom*, 29 HARV. J.L. & PUB. POL'Y 9, 17-18 (2005). The leading twentieth century discussion of offense and harm was arguably JOEL FEINBERG, OFFENSE TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW 59 (1985). Feinberg's discussion was in turn variously critiqued. *See, e.g.*, R.A. Duff, *Harms and Wrongs*, 5 BUFF. CRIM. L. REV. 13, 16-19 (2001) (noting the possibility of severe setbacks to someone's basic interests that do not violate any relevant rights, as in the case of fair competitions for valued resources); Robert Amdur, *Harm, Offense, and the Limits of Liberty*, 98 HARV. L. REV. 1946, 1947 (1985) (book review) ("For Feinberg, . . . to harm another person we must set back, thwart, or defeat his interests in a way that violates his rights."); Gerald Dworkin, 98 PHIL. REV. 239, 239-42 (1989) (book review); Bernard Gert, *Critical Notices*, 48 PHIL. & PHENOMENOLOGICAL RES. 147, 151-52 (1987) (book review) ("Profound offenses are not merely disliked states, they are an impersonal affront to one's 'deepest moral sensibilities.'" (quoting FEINBERG, *supra*, at 59)); Judith Jarvis Thomson, *Feinberg on Harm, Offense, and the Criminal Law: A Review Essay*, 15 PHIL. & PUB. AFF. 381, 386-87 (1986) (book review) (discussing Feinberg's complex factors to be assessed in cases where offenses are claimed to be rights-violative); Robert E. Rodes, Jr., *Limits of Law*, 48 REV. POL. 481, 481-83 (1986) (book review).

the persons distracted. If it is unwelcome, the distraction may take the form of imposed thoughts and images, regularly replayed mentally, unpleasantly, and involuntarily. In some, but hardly all cases, distracting speech might occur without any further clear harm in grades, class standing, attendance, or college prospects. Distracting speech by students may or may not have any sort of social point or raise any matter of possible public concern. In this sense, the categorical constitutional value of the distracting speech may vary widely. Speech might reasonably be judged distracting from basic educational aims even if the speech's effects are not by themselves so severe or pervasive as to demonstrably deny access to equal educational opportunity over a period of time.[45]

Certainly there is no reason to suppose that speech a school judges to be significantly distracting must necessarily also be objected to on the basis of its viewpoint. This is true whether the speech seeks to address a matter of public interest or, presumably less valuably, does not. School officials could well agree with, be indifferent to, or admittedly not entirely understand the message of distracting student speech. We see this in the school uniform and dress code cases.[46] Even where the school officials do in some sense disagree with the viewpoint of the speech, they may be predominantly, and sufficiently, motivated to regulate that speech based on its level of distraction.

Interesting questions would certainly arise under a distraction-based school speech standard. Suppose, for example, a particular student speech had a number of students largely pre-occupied for several days on whether they should boycott school, refuse to do any class assignments, plagiarize papers, or some such course of action. It would be possible to ask first whether this allegedly distracting speech might undercut academic learning, but also uniquely promote other important public school missions, including irreplaceably contributing to the students' civic competence. If so, some reasonable balancing of basic school purposes in unavoidable conflict should be permissible. Some judicial deference

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45. *See, e.g.*, Moore v. Marion Cmty. Sch. Bd. of Educ., No. 1:04-CV-483, 2006 WL 2051687, at *6-7 (N.D. Ind. July 19, 2006) (holding that peer harassment on the basis of gender in public school context evokes a similar standard guided by Title VII workplace discrimination law); *see also* Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 967, 975 (S.D. Ohio 2005) (granting injunction to allow a high school student to wear, and finding no violation of target group rights in, a t-shirt featuring a Bible verse on the front and the words "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!" on the back). For brief reference, see Brett Thompson, Comment, *Student Speech Rights in the Modern Era*, 57 MERCER L. REV. 857, 875 (2006) (discussing briefly the *Nixon* court's findings of no violation of the right "to be let alone" under *Tinker*).

46. *See, e.g.*, Blau *ex rel.* Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 391 (6th Cir. 2005) (reviewing public school dress code intended to "focus[] attention upon learning and away from distractions" in order to promote school goals without seeking to "regulate any particular viewpoint"); Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 443 (5th Cir. 2001) (applying only intermediate scrutiny, rather than *Tinker*, to a school uniform requirement that was thought to be both aimed at enhancing the educational process and neutral with regard to student speech viewpoint).

to fairly exercised local democratic decisionmaking and local expertise, in light of our commitment to free speech values, would seem sensible.

The school's official viewpoint that its own basic mission should be optimally, non-repressively furthered is itself in some sense a viewpoint. We might call it a meta-viewpoint or a viewpoint about all viewpoints expressed within the school. It is a viewpoint the public must hope any school will hold. A school should not be legally handicapped for fairly taking its democratically assigned and democratically supervised vital mission seriously on school grounds and during school hours.[47]

II. THE PUBLIC SCHOOLS: ESSENTIAL PURPOSES AND PERMISSIBLE APPROACHES

American public schools are widely thought to serve a number of basic pedagogical and civic purposes. Plainly, these various purposes cannot be reduced to, or invariably subordinated to, the one purpose of maximizing current free speech among students or even maximizing the free speech of their future selves as a free speech training ground.

In a non-school context, however, Judge Richard Posner has argued forcefully for the free speech rights of juveniles as future voting citizens.[48] Citing *Tinker*, Judge Posner has urged that

> [t]he murderous fanaticism displayed by young German soldiers in World War II, alumni of the Hitler Jugend, illustrates the danger of allowing government to control the access of children to information and opinion. Now that eighteen-year-olds have the right to vote, it is obvious that they must be allowed the freedom to form their political views on the basis of uncensored speech *before* they turn eighteen, so that their minds are not a blank when they first exercise the franchise . . . . People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble.[49]

Public schools would certainly be derelict in their responsibilities if they commonly graduated persons blank of mind and incapable of discharging their civic obligations. Students must indeed not be raised in anything remotely like an intellectual bubble. Whatever the status of any student's free speech rights, certainly no student's speech rights should be reduced to the point at which Judge Posner's account above becomes even remotely descriptive.

Beyond meeting this standard, however, public schools are also expected to,

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47. *See, e.g.*, Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 287 (5th Cir. 2001). For administrative overreaching, see the public sidewalk speech case of *Frederick v. Morse*, 439 F.3d 1114 (9th Cir. 2006), *rev'd*, 127 S. Ct. 2618 (2007).

48. Judge Posner has addressed this, in particular, with respect to juvenile access to violent video games in a public arcade setting without the supervision of a parent or guardian. *See* Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 576-77 (7th Cir. 2001).

49. *Id.* (emphasis added).

in various ways, promote "'the shared values of a civilized social order.'"[50] Somewhat more specifically, the courts have recognized the public schools' "role as 'a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.'"[51]

Some mixture of cultural socialization, imparting technical and liberal arts knowledge, and promoting civic values and civic competencies is a democratic cultural aim long antedating public schools in their familiar form. Let us recall the aspiration, if not the reality, of Athenian civic life as far back as the time of Pericles:

> [O]ur ordinary citizens, though occupied with the pursuits of industry, are still fair judges of public matters; for, unlike any other nation, regarding him who takes no part in these duties not as unambitious but as useless, we Athenians are able to judge at all events if we cannot originate, and, instead of looking on discussion as a stumbling-block in the way of action, we think it an indispensable preliminary to any wise action at all.[52]

In roughly the same time and place, Platonic civic participatory education focused most crucially on "the early stages" of life:

> [W]hen habits, tastes, and aspirations are formed; when heroes and objects of emulation and reverence are set before the imagination's eye; when a communal sense of shared destiny is shaped; when gratitude to the past and responsibility for future generations is instilled; when capacities for collective deliberation and action, for leadership and loyalty, are discovered, tested, and celebrated.[53]

This description focuses directly on deliberation and speech skills, if not on unimpaired speech among students. There is, however, already a sense that education has a number of purposes and dimensions, any of which might come into conflict with what we might today think of as student speech rights.

The development of modern views of democratic education and its civic dimensions has been halting and unsteady. Rousseau, for example, developed civic educational theory,[54] but distrusted what we would think of as diversity,

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50. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

51. *Id.* (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

52. THUCYDIDES, *Pericles' Funeral Oration*, *in* THE PELOPONNESIAN WAR BOOK 2.34-46, *available at* http://www.fordham.edu/Halsall/ancient/pericles-funeralspeech.html (last visited Oct. 31, 2007).

53. THOMAS L. PANGLE, THE ENNOBLING OF DEMOCRACY: THE CHALLENGE OF THE POSTMODERN ERA 164 (1992). For a much more focused and extended treatment of the theory of Athenian and Platonic education, see WERNER JAEGER, PAIDEIA: THE IDEALS OF GREEK CULTURE (Gilbert Highet trans., Oxford Univ. Press 1945) (1939).

54. *See, e.g.*, Terrence E. Cook, *Rousseau: Education and Politics*, 37 J. POL. 108, 123

pluralism, particularism, and their celebration.[55] Influenced by Rousseau, Immanuel Kant emphasized the duty of self-improvement and mental cultivation[56] for the sake of eventual freedom and independence.[57] These themes are generally friendly to the broad ideas of freedom of thought and discussion, whether in school or not, but they do not seem to call for the general sacrifice of civic and educational values before the asserted speech rights of students.

The early constitutional experience with general and civic education in the United States was, according to Alexis de Tocqueville, of mixed character. Tocqueville wrote:

> In New England every citizen receives the elementary notions of human knowledge; he is taught, moreover, the doctrines and the evidences of his religion, the history of his country, and the leading features of its Constitution.
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> . . .
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> What I have said of New England must not, however, be applied to the whole Union without distinction; as we advance towards the West or the South, the instruction of the people diminishes.[58]

As the nation later developed, our leading modern educational theorist, John Dewey, recognized a broad educational mandate unattainable by straightforwardly libertarian means. Dewey argued that "it is the business of the school environment to eliminate, so far as possible, the unworthy features of the existing environment from influence upon mental habitudes."[59] Doubtless this Deweyan mandate extends beyond distraction and into curriculum as well.

The sense of the multifacetedness of education aimed at civic competence has understandably remained. Professor and University of Pennsylvania President Amy Gutmann, for example, observes that children begin to "develop capacities for criticism, rational argument, and decisionmaking by being taught how to think logically, to argue coherently and fairly, and to consider the relevant alternatives before coming to conclusions."[60] In some measure, this is a matter of affirmative teaching and positive inculcation, rather than merely the disinhibition of student speech. Professor Howard Gardner similarly writes that understanding any subject matter requires authoritative confrontation with

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(1975) (citing, inter alia, JEAN-JACQUES ROUSSEAU, ÉMILE: OR ON EDUCATION (Barbara Foxley trans., 1974) (1762)).

55. *See id.* More broadly, and outside the context of education, see JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT (Maurice Cranston trans., 1968) (1762).

56. *See* IMMANUEL KANT, EDUCATION 11 (Annette Churton trans., Univ. of Mich. Press 1960) (1803).

57. *Id.* at 28.

58. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 315-16 (Francas Bowen & Phillips Bradley eds., Henry Reeve trans., Alfred A. Knopf 1963) (1835).

59. JOHN DEWEY, DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION 24 (MacMillan Co. 1957) (1916).

60. AMY GUTMANN, DEMOCRATIC EDUCATION 50 (1987).

"natural" and strongly held popular misconceptions in thought and speech.[61] Civic competence should not be viewed as a natural process that spontaneously occurs when constraints are removed. Authoritative structuring of the educational environment may be required as well.

III. POLITICAL AND GENERAL KNOWLEDGE AND POLITICAL PARTICIPATION IN RECENT DECADES: AN INVITATION TO RESPONSIBLE EXPERIMENTATION WITH THE *TINKER* RULE

At this point, we should briefly consider a few measures of civic interest, civic competence, and general educational achievement over the past several decades. On such bases, school districts and public school administrations could fairly conclude that the post-*Tinker* era has, for one reason or another, not amounted to a Golden Age of political and broader sorts of education or of key forms of political participation by public school and other graduates.

This is certainly not to say that the *Tinker* decision is to blame or that all reasonable school administrators in general must draw similar conclusions. Reasonable persons can read the accumulating historical evidence and draw different conclusions. Our argument is merely that a sense of improvability along the lines of civic and general educational competence is certainly not always outside the bounds of reasonableness.

Nor is this to suggest that the *Tinker* decision or its implementation has provably contributed to any less than ideal educational or civic outcomes. No such demonstrable causal relationship is claimed herein. As merely one among many complications, let us recall that the right to vote in federal elections was extended to eighteen year olds for the first time in 1970,[62] just as the *Tinker* decision was first being implemented.

Thus, the question is not whether *Tinker* has by itself had provable adverse civic or educational consequences. The question is instead whether a particular school administrator could reasonably believe that some appropriate modification of the *Tinker* rule could in some way promote non-distraction and a better overall realization of the school's essential civic and educational missions. Modifying *Tinker* is by itself unlikely to have dramatic effects on education and civic life.

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61. *See* HOWARD GARDNER, CHANGING MINDS: THE ART AND SCIENCE OF CHANGING OUR OWN AND OTHER PEOPLE'S MINDS 139 (2004). By way of conflict, at least in emphasis, see Carlos Alberto Torres, *Paulo Freire as Secretary of Education in the Municipality of São Paulo*, 38 COMP. EDUC. REV. 181, 201 (1994) ("Curriculum reform starts with administrators and teachers learning how to listen to their students."). For brief statements of the role of genuine freedom of speech in adult civic engagement and responsible decisionmaking, see, e.g., ROBERT A. DAHL, ON POLITICAL EQUALITY 8-9 (2006) (discussing the speech requisites of "ideal democracy"); JURGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 88-89 (Christian Lenhardt & Shierry Weber Nicholsen trans., 1991) (1983).

62. *See* U.S. CONST. amend. XXVI. Among other considerations might be the 1965 Voting Rights Act, 42 U.S.C. § 1973 (2000), along with other attempts, in various forms at different levels, to either enhance, or at least inadvertently, to reduce voter turnout.

Other sorts of cultural, pedagogical, and funding changes, for example, might be required as well. However, modifying *Tinker* might also have symbolic or expressive purposes, and some such symbolic statements may be worth making. Paradoxically, well-chosen "symbolic" changes may over time actually catalyze more substantive changes.

Anyone concerned with public schools and free speech should be permitted to consider, for example, rates of voter turnout and political participation. The current consensus seems to find a general, but not invariant, modest decline in national voter turnout rates, perhaps beginning around 1960, but more clearly from 1972.[63] The percentage turnout of the voting-age population in presidential elections from 1960 and 1968 was in the low 60% range, with the rate then declining to 55.21% in 1972 and remaining in the middle to low 50% range thereafter through the 1996 presidential election.[64] The general trends are seen among high school graduates and among college graduates, though at higher voting levels among the latter.[65]

One could debate the civic healthiness of diminished voter turnout over the past several decades.[66] Our point is simply that at least some school districts could reasonably doubt the civic healthiness of such trends and could reasonably wish to promote an educational experience inspiring greater political participation, even at the cost of modifying the *Tinker* rule as one element in such a response.

We again need not suggest that *Tinker* has, by itself, led to any harmful civic consequences. Cause and cure need not be mirror images of one another. Let us consider an analogy. We might "cure" smokiness in a room by turning on a fan or opening a window, without claiming that the "off" fan or the closed window "caused" the smokiness. Firefighters may "cure" a fire their absence did not

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63. *See, e.g.*, Peter F. Nardulli et al., *Voter Turnout in U.S. Presidential Elections: An Historical View and Some Speculation*, 29 PS: POL. SCI. & POL. 480, 480 (1996). *Cf.* Ortiz v. City of Phila., 28 F.3d 306, 318 (3d Cir. 1994) (Scirica, J., concurring) ("For some time now, Congress and the state legislatures, concerned by low voting rates, have commendably sought to increase voter participation."); Condon v. Reno, 913 F. Supp. 946, 967 (D.S.C. 1995) ("Congress identified a nationwide problem of low electoral participation.").

64. *See* Federal Election Commission, National Voter Turnout in Federal Elections: 1960-1996, http://www.fec.gov/pages/htmlto5.htm (last visited Oct. 31, 2007). For additional data, see United States Census Bureau, Table A-1. Reported Voting and Registration by Race, Hispanic Origin, Sex, and Age Groups: November 1964-2000, http://www.census.gov/population/socdemo/voting/tabA-1.xls (last visited Nov. 20, 2007).

65. *See* United States Census Bureau, Table A-1. Reported Voting and Registration by Race, Hispanic Origin, Sex, and Age Groups: November 1964-2000, http://www.census.gov/population/socdemo/voting/tabA-1.xls (last visited Oct. 31, 2007). For further discussion, see, e.g., Steven Tenn, *An Alternative Measure of Relative Education to Explain Voter Turnout*, 67 J. POL. 271, 271 (2005) (noting that highly educated people are more likely to vote, but that voter turnout has not significantly increased even though average educational attainment has risen).

66. It is hardly unusual for despotic states to boast of high voter turnout rates, typically endorsing the entrenched regime.

"cause." Local modification of *Tinker*, among other responses, might, as in extinguishing a fire by removing oxygen that did not itself cause the fire, allow for better fulfillment of a school's overall civic and educational mission for reasons suggested herein.[67]

Consistently unimpressive levels of electoral participation by high school and college graduates are only a portion of the picture. Participation is one thing, and knowledge is another. The *Tinker* regime in the schools has, arguably, hardly coincided with a Golden Age of political knowledge and understanding among those fully exposed to the broad post-*Tinker* public school free speech experience. One author has in fact recently referred to "the overwhelming evidence that the American electorate fails to meet even minimal criteria for adequate voter knowledge,"[68] and has observed that "[f]ew people dispute the well-established conclusion that most individual voters are abysmally ignorant of even very basic political information."[69]

It is difficult to argue with universal persuasiveness that *Tinker* and *Tinker*-inspired speech have ameliorated this situation. Despite increases in formal schooling and school spending, "the level of political knowledge in the American electorate has increased only very slightly, if at all, since the beginning of mass survey research in the late 1930s."[70] There is evidence that among first-year college students since the mid 1960s, "every significant indicator of political engagement has fallen by at least half."[71] This generalized low civic engagement

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67. *See supra* Part II.

68. Ilya Somin, *When Ignorance Isn't Bliss: How Political Ignorance Threatens Democracy*, POL'Y ANALYSIS, Sept. 22, 2004, at 1, 2, *available at* http://www.cato.org/ pubs/pas/pa525.pdf (visited Nov. 20, 2007).

69. *Id.* at 3. Note, e.g., that "[m]ost of the time, only bare majorities [in this case of the public, not of voters] know which party has control of the Senate." *Id.* at 4. Further, "voters are ignorant not just about specific policy issues but also about the basic structure of government and how it operates." *Id.*

70. *Id.*

71. *Id.* By way of further illustrative specifics, the 2000 National Election Survey resulted in 11% of respondents identifying the position of Chief Justice of the Supreme Court as the position then held by William Rehnquist. *See id.* at 7. Equally awkwardly, a nationwide 1998 telephone survey of persons between the ages of thirteen and seventeen resulted in 2.2% of the respondents being able to specify William Rehnquist as Chief Justice. *See New Survey Shows Wide Gap Between Teens' Knowledge of Constitution and Knowledge of Pop Culture: More Teens Can Name Three Stooges than Can Name Three Branches of Government*, NAT'L CONST. CENTER, Sept. 2, 1998, http://www.constitutioncenter.org/CitizenAction/CivicResearchResults/NCCTeens'Poll.shtml. The robustness of these results is supported by a 2006 Zogby International telephone poll in which 77% of respondents were able to name two of the Seven Dwarfs, whereas only 24% of respondents were able to name two Justices of the Supreme Court. *See New National Poll Finds: More Americans Know Snow White's Dwarfs than Supreme Court Judges, Homer Simpson than Homer's Odyssey, and Harry Potter than Tony Blair*, http://aolmedia.tekgroup.com/article_print.cfm?article_id=1029 (last visited Nov. 20, 2007). For some indication that these sorts of problems extend even to seniors at the nation's leading universities, see AMERICAN COUNCIL OF

may or may not be linked in some way with starkly limited civic knowledge. It is certainly reasonable for particular educators to be concerned along the lines indicated by the well-respected political scientist William Galston:

> Whether we are concerned with the rules of the political game, political players, domestic policy, foreign policy, or political geography, student performance is quite low. This raises a puzzle. The level of formal schooling in the United States is much higher than it was fifty years ago, but the civic knowledge of today's students is at best no higher than that of their parents and grandparents. We have made a major investment in formal education, without any discernible payoff in increased civic knowledge.[72]

Neither the availability of courses in U.S. government[73] nor widespread involvement in volunteer or charitable activity seem to effectively address the lack of basic civic knowledge or the lack of broader civic and political engagement.[74]

This is again not to ascribe any significant blame precisely to the *Tinker* rule. Instead, one might question the broad process of political enculturation immediately preceding the *Tinker* case.[75] Nevertheless, it is reasonable for some

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TRUSTEES AND ALUMNI, LOSING AMERICA'S MEMORY: HISTORICAL ILLITERACY IN THE 21ST CENTURY 3 (2000), http://www.econ.berkeley. edu/users/webfac/czelusta/acta.pdf (finding 81% of elite university seniors unable to identify basic constitutional principles).

72. William A. Galston, *Civic Education and Political Participation*, PS: POL. SCI. & POL., Apr. 2004, at 263, 264, *available at* http://www.apsanet.org/imgtest/CivicEdPoliticalPariticipation.pdf (including voting in presidential and congressional elections, the reported importance of keeping up with politics, frequency of discussing politics, and acquiring political knowledge, whether from traditional news sources or from the Internet). One could, however, question setting the initial historical baseline in a time period when many first-year college students faced, apart from student deferments, the possibilities of a military draft into the same controversial war protested in *Tinker*.

73. *See id.*

74. *See* CONSTITUTIONAL RIGHTS FOUNDATION, EDUCATING FOR DEMOCRACY: CALIFORNIA CAMPAIGN FOR THE CIVIC MISSION OF SCHOOLS—THE CALIFORNIA SURVEY OF CIVIC EDUCATION 4 (2005), *available at* http://www.cms-ca.org/civic_survey_final.pdf.

75. Whatever the relationship between lack of civic knowledge and lack of civic engagement, it remains true that there are special risks associated with active civic engagement on the basis of either minimal knowledge or questionable normative beliefs. For example, a 2005 Knight Foundation study of 112,000 U.S. high school students found that "36% believe newspapers should get 'government approval' of stories before publishing; 51% say that they should be able to publish freely; [and] 13% have no opinion." Greg Toppo, *U.S. Students Say Press Freedoms Go Too Far*, USA TODAY, Jan. 30, 2005, http:// www.usatoday.com/news/education/2005-01-30-students-press_x.htm. The study results are available at http://firstamendment.jideas.org/downloads/future_final.pdf (last visited July 31, 2006). See in particular question forty-five at page seventy-nine. More impressionistically, see Diana Jean Schemo, *What a Professor Learned as an Undercover Freshman*, N.Y. TIMES, Aug. 23, 2006, at B8, *available at* http://www.nytimes.com/2006/08/23/

public school administrators to take seriously the view that "[a]t the core of our dysfunctional political culture is the degraded quality of civic discourse—how we talk about public problems."[76] Such administrators also need not take any stand on whether American politics has become more polarized over time or whether such polarization would or would not be a good thing.[77] There are, however, grounds to believe that political judgment and decisionmaking are often less informed by reason than many educators might prefer.[78]

More broadly, it would also be reasonable for some public school educators to be dissatisfied not only with their students' knowledge of narrowly civic or political material,[79] but also of various academic subjects that might bear upon

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education/23FACE.html (discussing professor "undercover" as a college student finding limited student interest in academics or in diversity, with "a pervasive, if tacit, emphasis on conformity and an undercurrent of cynicism").

76. Edward C. Weeks, *The Practice of Deliberative Democracy: Results from Four Large-Scale Trials*, 60 PUB. ADMIN. REV. 360, 360 (2000); *see also* GABRIEL A. ALMOND & SIDNEY VERBA, THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS 49 (Little, Brown & Co. 1965) (1963) (recognizing the categories of political "allegiants," political "parochials," and political "alienates").

77. Weeks, *supra* note 76.

78. *See, e.g.*, E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS (1991); Geoffrey C. Layman & Thomas M. Carsey, *Party Polarization and "Conflict Extension" in the American Electorate*, 46 AM. J. POL. SCI. 786, 786 (2002) (increasing elite or party-level polarization as leading to diverse reactions among the general voting public); Geoffrey C. Layman & Thomas M. Carsey, *Party Polarization and Party Structuring of Policy Attitudes: A Comparison of Three NES Panel Studies*, 24 POL. BEHAV. 199, 227 (2002); Cass R. Sunstein, Essay, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 118-19 (2000).

79. Political learning and discourse occurs in patently defective ways. A recent functional magnetic resonance imaging (fMRI) study of brain activity of political partisans is of special interest in this respect. *See Emory Study Lights Up the Political Brain*, SCI. DAILY, Jan. 31, 2006, http://www.sciencedaily.com/releases/2006/01/060131092225.htm ("'None of the circuits involved in conscious reasoning were particularly engaged' . . . . 'Essentially, it appears as if partisans twirl the cognitive kaleidoscope until they get the conclusions they want, and then they get massively reinforced for it, with the elimination of negative emotional states and activation of positive ones.'"); Michael Shermer, *The Political Brain: A Recent Brain-Imaging Study Shows that Our Political Predilections Are a Product of Unconscious Confirmation Bias*, SCI. AM., July 2006, http://www.sciam.com/article.cfm?id=the-political-brain. Crucially, though, this behavior need not be regarded as inevitable or unalterable. Charles Darwin, for example, apparently kept a special notebook for recording observations tending to falsify his own beliefs, recognizing his tendency otherwise to "forget" such observations. *See* David M. Buss, *Sexual Strategies Theory: Historical Origins and Current Status—The Use of Theory in Research and Scholarship on Sexuality*, J. SEX RES., Feb. 1998, *available at* http://www.findarticles.com/p/articles/mi_m2372/is_n1_v35/ai_20746721.

This is not to suggest that such cognitive biases are always without utility or redeeming value. For the mixed character of such biases, see generally HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (Thomas Gilovich et al. eds., 2002); JUDGMENT UNDER UNCERTAINTY:

reasonable public policymaking.[80] This broader deficiency could include nearly every academic skill and subject matter teachable in public schools. United States' students tend to "score low among developed nations in international comparisons of science, math, and reading"[81] and "relatively worse . . . the longer they stay in our schools."[82]

In particular, despite classroom emphasis, verbal SAT scores and reading ability scores have proved generally resistant to overall enhancement for several decades.[83] In its most extreme form, the indictment is brought that working

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HEURISTICS AND BIASES (Daniel Kahneman et al. eds., Cambridge Univ. Press 1986) (1982). For some intriguing theorizing, see Michael Huemer, *Why People Are Irrational About Politics*, http://home. sprynet.com/~owl1/irrationality.htm (last visited Nov. 20, 2007).

80. An unfortunate, if predictable, result of current testing policy is that "there is no accountability for whether or not students learn anything about American history or our democratic institutions. There is significant evidence that the students receive even less instruction than previously in subjects not tested [pursuant to the No Child Left Behind Act]." JAEKYUNG LEE, TRACKING ACHIEVEMENT GAPS AND ASSESSING THE IMPACT OF NCLB ON THE GAPS: AN IN-DEPTH LOOK INTO NATIONAL AND STATE READING AND MATH OUTCOME TRENDS 7 (2006), www. civilrightsproject.UCLA.edu/research/esea/nclb_naep_lee.pdf. For discussion of student knowledge of American history, see, e.g., Elizabeth Irwin, Conference Summary: Why Is U.S. History Still a Mystery to Our Children?, http://www.aei.org/events/filter.all,eventID.131/summary.asp (last visited Nov. 20, 2007) (citing the study by the American Council of Trustees and Alumni entitled "Losing America's Memory" (2000)) (noting the rise of a "visual culture," in conjunction with "students who have shrinking vocabularies, shorter attention spans, and less efficient reading skills" (remarks of Peter Gibbon, Harvard Graduate School of Education)).

81. E.D. HIRSCH, JR., THE KNOWLEDGE DEFICIT: CLOSING THE SHOCKING EDUCATION GAP FOR AMERICAN CHILDREN 1 (2006). This would include at least such mathematics as is needed to make minimal critical sense of arguments over economic policy, statistical arguments, tax rates, the environment, health, and so forth. *See* OECD, EDUCATION AT A GLANCE 2005: OECD BRIEFING NOTE FOR UNITED STATES 5 (2005), *available at* www.oecd.org/dataoecd/41/13/35341210.pdf ("[T]he performance in mathematics of 15-year old students in the United States was well below the OECD mean, ranking the United States in a tie for 21st place."); Jay Mathews, *For Math Students, Self-Esteem Might Not Equal High Scores—U.S. Lags Behind Countries that Don't Emphasize Self-Regard*, WASH. POST, Oct. 18, 2006, at A02.

82. HIRSCH, *supra* note 81, at 1; *see also* Diana Jean Schemo, *At 2-Year Colleges, Students Eager but Unready*, N.Y. TIMES, Sept. 2, 2006, at A1, *available at* http://www.nytimes. com/2006/09/02/education/02college.html ("Though higher education is now a near-universal aspiration, researchers suggest that close to half the students who enter college need remedial courses.").

83. *See* HIRSCH, *supra* note 81, at 2. Time-series data from 1992 to 2005 is reported in NATIONAL ASSESSMENT GOVERNING BOARD, U.S. DEPARTMENT OF EDUCATION, THE NATION'S REPORT CARD: 12TH-GRADE READING AND MATHEMATICS 2005, at 1 (2007), http://nces.ed.gov/ nationsreportcard/pdf/main2005/2007468.pdf (reporting that except among the top tenth of 12th grade readers, a general decline from 1992 to 2005, but with no significant decline from 2002 to 2005); Diana Jean Schemo, *Grades Rise, But Reading Skills Do Not*, N.Y. TIMES, Feb. 23, 2007, at A13; *see also* Jay Mathews, *SAT Records Biggest Score Dip in 31 Years*, WASH. POST, Aug. 30,

vocabularies have shrunk by more than half, with this vocabulary shrinkage not being confined to the young.[84] This is particularly true in the area of articulable distinctions among matters such as alternative public policies.[85] Again, our point is not to assert the truth of this set of claims, but to suggest the reasonableness of hypothetical responses by at least some school administrators.

Although there has been some progress, there is also cause for concern about trends and performance levels in the broad area of adult literacy. It is reasonable to be concerned that, beyond the data referred to above, "[t]he average American college graduate's literacy in English declined significantly over the past decade."[86] This point focuses directly on college graduates, but the capacity in question, literacy, as defined in one way or another, is also addressable in junior or senior high schools. Literacy has apparently been on a long-term decline not only among college graduates, but also "among all education levels."[87]

On this basis, school districts might reasonably conclude that optimally fulfilling the varied basic purposes of their public schools could call for a change

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2006, at A1; Press Release, College Board, College Board Announces Scores For New SAT® with Writing Section (Aug. 29, 2006), http://www.collegeboard.com/press/releases/150054.html. In turn, heavier emphasis on preparing for such tests has failed to improve the situation and has generated resistance. *See, e.g.*, Peter Whoriskey, *Political Backlash Builds Over High-Stakes Testing—Public Support Wanes for Tests Seen as Punitive*, WASH. POST, Oct. 23, 2006, at A3.

84. *See* David W. Orr, *Verbicide*, 13 CONSERVATION BIOLOGY 696, 696 (1999).

85. *See id.*

86. Sam Dillon, *Literacy Falls for Graduates from College, Testing Finds*, N.Y. TIMES, Dec. 16, 2005, at A34, *available at* http://www.nytimes.com/2005/12/16/education/16literacy.html (referring to results of the 2003 version of the Department of Education's National Assessment of Adult Literacy). For relevant statistics and some useful breakdowns, see MARK KUTNER ET AL., A FIRST LOOK AT THE LITERACY OF AMERICA'S ADULTS IN THE 21ST CENTURY (2005), *available at* http://nces.ed.gov/NAAL/PDF/2006470.PDF; PATRICK ROONEY ET AL., THE CONDITION OF EDUCATION 2006, *available at* http://nces.ed.gov/pubs2006/2006071.pdf; *see also* NOEL-LEVITZ, 2007 NATIONAL RESEARCH STUDY: SECOND ANNUAL NATIONAL FRESHMAN ATTITUDES REPORT 1 (2007), *available at* http://www.noellevitz.com/freshman (showing limited interest in reading for enjoyment and limited strength of study habits); Posting of Thomas C. Reeves to History News Network, http://hnn.us/blogs/entries/32493.html (Dec. 3, 2006, 8:33AM).

87. NATIONAL ENDOWMENT FOR THE ARTS, READING AT RISK: A SURVEY OF LITERARY READING IN AMERICA 6 (2004), *available at* http://www.arts.gov/pub/RaRExec.pdf (reporting that portion of U.S. adults reading literature as dropping by nearly ten percentage points from 1982 to 2002). None of this is to suggest that these or any similar trends are confined to the United States. It has, for example, been suggested that the better newspapers in the United Kingdom presume a vocabulary of at least 20,000 words, whereas the average sixteen-year-old girl has a vocabulary of 11,500 words and the average sixteen-year-old boy a vocabulary of 8,500 words. *See* the remarks of Mr. Colin Pickthall (West Lancashire), 279 PARL. DEB., H.C. (6th Ser.) (1996) 156. For casual discussion of possible distraction and a significant trend among British students toward dislike of reading with resulting effects on writing, see Boris Johnson, *Computer Games: The Writing Is on the Wall—Computer Games Rot the Brain*, http://www.boris-Johnson.com/archives/2006/12/computer_games.php (last visited Dec. 28, 2006).

in the school's pedagogical focus, including some authorized modification of the *Tinker* rule. In particular, distractions, including distracting student speech, may be thought to tend to undermine basic school purposes. Such distractions might well have such adverse effects even if they fall short of disruption, disorder, or relevant rights-violation under *Tinker*. Again, this is hardly a matter of rigorous provability, now or in the foreseeable future. But localized responsible experimentation, in the pursuit of uncontroversial, fundamental educational goals, may be appropriate even in the absence of guaranteed success.

The general idea of distraction as an impediment to efficient learning is familiar. Our admittedly imperfect social science[88] suggests that "[a] child reared on television might have a tough time when later asked to slow down and concentrate on a less visually stimulating medium, such as a second-grade teacher or a text book."[89] One study found, for example, that "[f]or every hour of television viewed per day before age 3, children were 10 percent more likely to have trouble paying attention by age 7."[90] Such studies extend established work linking television viewing to diminished attention spans among school age children,[91] even controlling for factors such as "depressed parents, prenatal substance abuse and socioeconomic status."[92]

Television as classically transmitted is, at least for the moment, not a major, direct, and immediate distraction within the school setting itself, as distinct from cell phones, laptops, video and camera phones, or various sorts of messaging and music or visual content provision. Various forms of distracting student speech and behavior, protected or unprotected by *Tinker*, have prompted concern on the part of many parents of public school children.[93] Some distracting student

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88. There may well be a sense in which "distraction" by definition involves interference with learning, but we are interested here in matters such as what could count as a distraction and from what sorts of learning a student might in one way or another be distracted.

89. Julie Davidow, *Television May Drive Kids to Distraction: Study Says Rapid Scene Changes Could Harm Concentration*, SEATTLE POST-INTELLIGENCER, Apr. 5, 2004, at A2, *available at* http://seattlepi.nwsource.com/health/167646_television05.html; *see also* Lori Aratani, *Teens Can Multitask, But What Are Costs?: Ability to Analyze May Be Affected, Experts Worry*, WASH. POST, Feb. 26, 2007, at A1; Dimitri Christakis, *Television Watching and Shortened Attention Spans*, PEDIATRICS FOR PARENTS, July 2004, *available at* http://www.findarticles.com/p/articles/mi_m0816/is_7_21/ai_n13246900; Christine Rosen, *Fast Forward to Passivity: There Are Risks Hidden Inside TiVo's Illusion of Control*, L.A. TIMES, Dec. 7, 2004, *available at* http://www.eppc.org/publications/pubID.2227/pub_detail.asp.

90. Davidow, *supra* note 89.

91. *Id.*

92. *Id.* Such considerations remind us that for some students the worst "distractions" may not be speech distractions in our sense, but may include family poverty, family instability, neighborhood poverty and violence, and school finances. *See* JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS (1991).

93. *See* Blau *ex rel.* Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 385-86 (6th Cir. 2005) (reviewing dress code policy explained by school partly in terms of avoiding distractions); National Public Radio, Americans Willing to Pay for Improving Schools, http://www.npr.org/about/

speech, it should be noticed, involves content more or less initiated by the "speaking" student. Other distracting student speech, however, is initiated by other persons and then transmitted through a student's conscious decision, typically with endorsement or appreciation, or else critically, to one or more other students in a "chain" of speech communication.

There have of course always been potential distractions in schools, including notes, tradeable cards and other tradeable objects, jewelry,[94] caps and hats[95] or other message-bearing clothing,[96] and of late wristbands associated with various causes. As distracting as these traditional forms might be in some cases, it is implausible that such distractions must always, or even typically, be potentially restricted under *Tinker*. That is, many such distractions do not rise to the level of actual or predictable disruption or disturbance nor to the level of violation of some sufficient right on the part of some third party. A daydreaming student is perhaps self-distracted, but hardly disruptive, disorderly, or rights-violative.

These traditional sorts of classroom distractions thus typically do not threaten disruptions, disorder, disturbances, or rights-violations that might justify restricting student speech under *Tinker*. Nor does distracting speech typically fall within the (uncertain) scope of *Fraser* or *Hazelwood*. The logic of disruption and rights-violation forces us to a similar conclusion regarding most forms of contemporary electronic distractions as well. Devices such as cell-phones (with or without camera or video capability),[97] Blackberries® and similar messaging devices, music and video-playing i-Pods® and their rivals, handheld personal

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press/990920.edpoll.html (last visited Nov. 22, 2007). For judicial validation of a concern for "distraction" in this context, see *Walz ex rel. Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271, 276-77 (3d Cir. 2003) ("A school must be able to restrict student expression that contradicts or distracts from a curricular activity."). The court here, however, may have had in mind overt disruption and disorder of a sort clearly prohibitable under *Tinker*'s established "disruption" exception. *See id.*

94. *See* Jeglin *ex rel.* Jeglin v. San Jacinto Unified Sch. Dist., 827 F. Supp. 1459, 1462 (C.D. Cal. 1993).

95. *Id.* at 1463 ("Hats and caps shall not be worn."); *Blau*, 401 F.3d at 385.

96. D.B. *ex rel.* Brogdon v. Lafon, 452 F. Supp. 2d 813, 814 (E.D. Tenn. 2006) (involving "clothing depicting the confederate battle flag"); *see also* Governor Wentworth Reg'l Sch. Dist. v. Hendrickson, 421 F. Supp. 2d 410, 411 (D. N.H. 2006) (involving symbolic "anti-Nazi" patch on school clothing). Graffiti of traditional sorts in public schools could also in some cases be distracting, but in some contexts might be removed or even sanctioned on content-neutral grounds without a need to meet the *Tinker* test. Other forms of graffiti, as in the case of racist graffiti and counter-graffiti, may give rise to issues under *Tinker*. *See* Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 248, 252-53 (3d Cir. 2002).

97. *See* Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622, 640 (E.D. Pa. 2006) (referring to "school's policy prohibiting use or display of cell phones during school hours"); *Your Bra is Ringing: Students Defy Ban*, N.Y. DAILY NEWS, Nov. 16, 2006, http://www.nydailynews.com/news/2006/11/16/2006-11-16_your_bra_is_ringing_students_defy_ban.html; *see also infra* note 109.

game devices, and laptops[98] with their multiple functions can all be used in various ways without affecting non-consenting persons in ways not amounting to disruption, disorder, or rights-violation under *Tinker*. The next generations of such devices could be more engagingly attractive, more social, yet less obtrusive to non-consenters. There may eventually be some risk that the students' increasingly chronic distractedness might come to affect our view of what it is fair and realistic to expect students to learn and accomplish.

These and other emerging technologies are certainly not the first technologies with the potential to distract. Blank notebook paper could always be doodled upon, and paper notes passed. Literal window technology allowed for extended staring outside. Still, many new and emerging technologies hold a potential for distraction, as well as for legitimate use, far exceeding that of traditional technologies. Some such technologies may be unusually "involving" if not in some sense even mildly "addictive." The potential for increased personal distraction in school, individually or socially, seems at the very least easily arguable.

Most of this emerging technological distraction may be directly confined to students voluntarily utilizing the technology. Some forms of the new distractions—visible images on laptop screens or on a cell phone, audible music, cameras, or ringing as opposed to silent or vibrate-mode cell phones[99]—may distract other students, consenting or non-consenting, as well. But such distractions, even if involuntary, may not fall within the scope of disturbance or disruption or rights-violation under *Tinker*. Distraction may seem increasingly "normal." Much, if not all, student speech-based distraction will not, on mainstream judicial interpretation, fall within the scope of the exceptions to protected speech in *Tinker* or subsequent Supreme Court student speech cases. The gulf between distracting speech and physical altercations or rights-violations is shown clearly by the fact that distracting speech need not be disapproved of, and may indeed be enthusiastically and unequivocally welcomed by those who are most distracted.

Even the worst forms of speech distraction will thus not typically amount to impending disruption, disturbance, or rights-violation sufficient under *Tinker* and

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98. For the controversial use of unconstrained laptop, Internet, or messaging capacity use even in law school classes, see Posting of Orly Lobel to Prawfsblawg, http://prawfsblawg.blogs.com/prawfsblawg/2006/07/banning_laptops.html (July 27, 2006, 2:34PM). More broadly, see Christina Silva, *Some Colleges Crack Down on Laptop Use in Classroom: Teachers Say It Distracts from Class Participation*, BOSTON GLOBE, June 10, 2006, at B1, *available at* http://www.boston.com/news/education/higher/articles/2006/06/10/some_colleges_crack_down_on_laptop_use_in_classroom; Jeffrey R. Young, *The Fight For Classroom Attention: Professor vs. Laptop—Some Instructors Ban Computers or Shut Off Internet Access, Bringing Complaints from Students*, CHRON. HIGHER EDUC., June 2, 2006, at A27.

99. The point has, however, been made that a cell phone going off in class even in vibrate mode can be distracting, i.e., that there is a difference in distractive potential even between silent and vibrate mode.

its progeny to justify restricting speech[100] with a student as a speaker or listener.[101] It is nevertheless reasonable to imagine that such distractions may voluntarily or involuntarily impair the educational experience of at least some students. Indeed, distractions not subject to limitation under *Tinker* may adversely affect the educational mission as severely, if not more severely, than some brief actual or looming physical or verbal confrontations, altercations, or playground brawls deemed to qualify as disruptions, disturbances, or cognizable rights-violations under *Tinker*.[102]

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100. Certainly the interactive use of a computer, a telephone, or even a violent video game is typically held to involve speech for First Amendment purposes. *See* United States v. Am. Library Ass'n, 539 U.S. 194, 198 (2003) (public library Internet filtering and blocking case); Sable Commc'n of Cal., Inc. v. FCC, 492 U.S. 115, 117 (1989) (involving "indecent" commercial phone message); Am. Amusement Mach. Ass'n v. Kendrick, 244 F.3d 572, 573 (7th Cir. 2001) (involving public violent video game ordinance). Even the playing of a relatively static communicative medium, such as a phonograph record, in an essentially private way, such as through headphones or earphones, can involve speech for constitutional purposes. *See, e.g.*, McCollum v. CBS, Inc., 249 Cal. Rptr. 187, 188-90 (Ct. App. 1988). For even unsolicited commercial e-mail as speech subject to ordinary constitutional commercial speech tests, see, e.g., *White Buffalo Ventures, LLC v. University of Texas at Austin*, 420 F.3d 366, 374-75 (5th Cir. 2005).

101. The student's status as speaker or writer on the one hand, or as listener or viewer on the other, should not be typically crucial to the student's ability to assert a free speech claim. As well, one can distract other persons in various capacities. *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both." (footnote omitted)).

A further dimension of the problem is that some lower courts have held that the distinction between speech on public interest and concern, compared to speech that is not on public interest and concern, is not applicable in the *Tinker* context. *See* Pinard v. Clatskanie Sch. Dist. 6J, 446 F.3d 964, 974 (9th Cir.), *amended by* 467 F.3d 755 (9th Cir. 2006). *Contra* Garcetti v. Ceballos, 126 S. Ct. 1951, 1958 (2006) (highlighting, among other considerations, the difference in free speech protection accorded speech on matters of public as opposed to merely personal interest in the context of public employee speech). This raises the possibility of student speech that is not regulable under *Tinker*, but that is both distracting and also not on any publicly consequential subject. Distractingness combined with the subject-matter triviality of the student speech could heighten the case for the reasonable regulation of the speech in such cases.

102. *See, e.g.*, Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 255 (3d Cir. 2002) (acknowledging recent "serious disruptive incidents" in the school system, but questioning their relevance to the particular speech sought to be regulated); Saxe *ex rel.* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 212 (3d Cir. 2001) (referring to a "well-founded expectation of disruption" standard not met in *Saxe* itself); West v. Derby Unified Sch. Dist. No. 206, 206 F.3d 1358, 1367 (10th Cir. 2000) (validating the prevention and not mere punishment of disruption and disturbance of a cognizable sort); *see also* Scott *ex rel.* Blitch v. Sch. Bd. of Alachua County, 324 F.3d 1246, 1248 (11th Cir. 2003) ("[S]chool officials are on their most solid footing when they reasonably fear that certain speech is likely to 'appreciably disrupt the appropriate discipline in the school.'" (citing Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267, 1271 (11th Cir. 2000))

In sum, "mere" distractions may well not qualify as actual or likely impending disruptions, disturbances, or rights-violations under *Tinker*. But they may in some respects be as bad or worse in their effects on learning, on student attention spans, on concentration, and on the value of the educational experience. "Mere" distraction, in an increasing variety of forms, may undermine basic educational purposes and missions.

It would be possible for a court to redefine the scope of disruption or rights-violation under *Tinker* to encompass such educational mission-impairing distractions. This dramatic redefinition would verbally preserve *Tinker*, at least superficially, as the guiding precedent. But even then, there is something to be said for a more candid and explicit modification of *Tinker*. This latter alternative seems more forthright than oddly redefining and expanding *Tinker*'s existing exceptions.

In any event, we can easily imagine a school administrator who is motivated by a desire to promote the crucial educational mission of the public schools, perhaps as classically articulated in *Brown v. Board of Education*.[103] Such an administrator might be specifically concerned by the catalogue of disturbing educational and civic outcomes briefly noted above.[104] Thus an administrator today might reassess the constitutional status of speech distraction by recalling the crucial language from *Brown*:

> Today education is perhaps the most important function of state and local governments . . . . It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.[105]

Despite the limits of *Tinker* as currently interpreted, a reasonable administrator might well be moved to endorse, merely for example, a school dress code or even a school uniform policy: "We expect students to maintain the type of appearance that is not distracting to students, teachers, or the educational process of the school."[106] Whether the distraction takes the form of words or symbols on clothing, as in the case of Confederate battle flag insignia,[107] or any

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(setting aside restriction of student speech based on its vulgarity or offensiveness).

103. 347 U.S. 483 (1954).

104. *See supra* notes 64-90 and accompanying text.

105. *Brown*, 347 U.S. at 493; *see also, e.g.*, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 469 (1988) (Marshall, J., dissenting) ("'[E]ducation is necessary to prepare citizens to participate effectively and intelligently in our open political system . . . .'" (quoting Wisconsin v. Yoder, 406 U.S. 205, 221 (1972))).

106. Blau *ex rel.* Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 386 (6th Cir. 2005); Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 469-70 (6th Cir. 2000) (citing a school official affidavit that particular "message" t-shirts were "a distraction" and "contrary to our educational mission").

107. *See supra* note 102; *see also* Castorina *ex rel.* Rewt v. Madison County Sch. Bd., 246

other form of speech on matters politically significant or trivial[108] need not be decisive. Even the current case law to some degree attempts to recognize "schools' need to control behavior and foster an environment conducive to learning."[109]

A reasonable school administrator might also wish to reconsider the distinction between protected "distracting" speech and unprotected "disorderly, disruptive, or rights-violative" student speech in the context of distraction cases such as *Chandler v. McMinnville School District*.[110] In *Chandler*, two high school students wore and distributed various buttons and stickers during school in response to the school's hiring of replacements for legally striking teachers, among whom were the fathers of the two students.[111] Among the slogans displayed on the buttons were "'Do scabs bleed?'"[112] and "'I'm not listening scab.'"[113]

The Ninth Circuit held that the buttons in question were not inherently disruptive,[114] which may well have been entirely correct in the sense intended by *Tinker*. Nor would this particular student speech be of the sort most likely to evoke a neutral, dispassionate, pedagogically reflective response from a school administration. After all, the speech involved in this case focused not on some diffuse national policy issue, but directly on the actions and decisions of the local school administration itself.

F.3d 536, 538 (6th Cir. 2001); Denno *ex rel.* Denno v. Sch. Bd. of Volusia County, Fla., 218 F.3d 1267, 1270-71 (11th Cir. 2000); D.B. *ex rel.* Brogdon v. Lafon, 452 F. Supp. 2d 813, 814 (E.D. Tenn. 2006); Bragg v. Swanson, 371 F. Supp. 2d 814, 816 (W.D. W. Va. 2005).

108. Again, *Tinker* free speech protection does not yet appear to require some minimum threshold of public interest in the subject matter of the speech. *See* Pinard v. Clatskanie Sch. Dist. 6J, 446 F.3d 964, 967-68 (9th Cir.), *amended by* 467 F.3d 755 (9th Cir. 2006). For an entertaining case in which the student speech, off campus and during a non-curricular activity, was neither on a merely personal matter, nor by admission meaningful if addressing a matter of public interest, see *Frederick v. Morse*, 439 F.3d 1114 (9th Cir.) (displaying "Bong Hits 4 Jesus" banner), *rev'd*, 127 S. Ct. 2618 (2006).

109. Walker-Serrano *ex rel.* Walker v. Leonard, 325 F.3d 412, 416 (3d Cir. 2003) ("[T]he First Amendment has never been interpreted to interfere with the authority of schools to maintain an environment conducive to learning."). Teachers and students have occasionally been videotaped in class without consent, with the videos then sometimes turning up on fora such as YouTube. *See* Paul Shukovsky & Nina Akhmeteli, *Free Speech vs. Class Disruption: Court to Decide if Teen Can Be Suspended over Video of Teacher*, SEATTLEPI.COM, May 22, 2007, *available at* http://seattlepi.nwsource.com/local/316618_youtube22.html. In some permutations of such cases, neither disruption nor relevant rights-violation may fully capture the effects of the distraction.

110. 978 F.2d 524 (9th Cir. 1992).

111. *See id.* at 526.

112. *Id.*

113. *Id.* at 530-31.

114. *See id.* We may also set aside any concern that the buttons could be restricted as somehow lewd, vulgar, or plainly offensive as to manner of speech under *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). *See Chandler*, 978 F.2d at 528-29.

The *Chandler* case, however, raises the possibility that *Tinker*'s focus on disruption, disorderliness, and rights-violation, even as supplemented by *Fraser*'s concern for lewd, vulgar, or plainly offensive speech,[115] in school assemblies or independently uttered, ignores some forms of speech that may undermine achievement of a school's most basic goals. A reasonable school administration, in a more neutral position than that occupied in *Chandler*, could wonder whether the distributed buttons promoted distraction among students or less than optimal student attentiveness to the curricular lessons.

Doubtless, the buttons in *Chandler* vividly brought home a civics lesson unfolding before the students themselves. In this respect, the buttons could be of unusually large free speech value. It is assumed that the question of whether "scabs bleed"[116] was intended and understood in merely a rhetorical sense. There is also a sense in which the rhetorical slogan "I'm not listening scab"[117] could be reasonably imagined to worsen and not merely evidence a problem of curricular distraction. Some sort of contextualized balancing of educational and civic interests might seem appropriate.

This is not to suggest that most individual buttons, or similar speech expressions, by themselves create significant distraction from basic educational tasks and achievement. It is also not to decide from afar whether the undoubted free speech value of the buttons in question somehow outweighed the distraction associated with the buttons. Buttons with messages may express valuable speech, but may also express a pre-existing distractedness, as well as promote further distraction. A reasonably detached administrator might conclude that some forms of symbolic or literal student speech, whether in the form of clothing, jewelry, electronics, accessories, or some other medium, taken in the aggregate[118] and in context,[119] can contribute to a problem of classroom distraction.

Restrictions on speech certainly cannot always be justified by pointing to associated harms, even where the harms can be characterized in some politically neutral way,[120] and even where the harms may be substantial.[121] Some

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115. *See Fraser*, 478 U.S. at 683.

116. *Chandler*, 978 F.2d at 526.

117. *Id.*

118. By analogy, when trial court errors, each of which is harmless in isolation, are aggregated in context, the overall cumulative effect may in some cases be legally harmful. *See, e.g.*, United States v. Schuler, 458 F.3d 1148, 1156 (10th Cir. 2006) (citing United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990) (en banc)); United States v. Baker, 432 F.3d 1189, 1223 (11th Cir. 2005) ("[T]he cumulative prejudicial effect of many errors may be greater than the sum of the prejudice caused by each individual error." (citing United States v. Sepulveda, 15 F.3d 1161, 1195-96 (1st Cir. 1993))).

119. *See supra* note 118. The law certainly need not treat, say, individual instances of pollution in isolation and out of any context; some environmental harms are dependent on aggregation, cumulation, interaction, or synergistic effects. *See, e.g.*, United States v. Alcan Aluminum Corp., 315 F.3d 179, 186-87 (2d Cir. 2003); United States v. Alcan Aluminum Corp., 964 F.2d 252, 264 (3d Cir. 1992).

120. *See* R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The*

accounting of the various speech interests and other cognizable interests at stake should be taken.[122] The very real costs of free speech are of course in many contexts worth bearing.

Courts should, however, be reluctant to systematically undervalue the broad educational achievement interests potentially at stake[123] in student speech cases, at least where the school administration has no obvious personal, partisan, or narrowly political stake in the regulation.[124] Courts generally are not better positioned, even through judicial independence, than experienced on-site school administrators to identify, assess, and address educational distraction through student speech.

Common sense might tell outsiders, for example, that there are distinctions to be drawn between pro-drug or pro-alcohol speech on school clothing and anti-drug or anti-alcohol speech on school clothing, perhaps with differences in their realistic potential for distraction. Pro-drug and anti-drug speech, we might think, are readily distinguishable. Speech on school clothing endorsing a school's anti-drug policy rather than rejecting it could, issues of viewpoint preference aside,[125] perhaps be thought as correspondingly less distracting. There may be a tendency for outsiders in particular to imagine that such speech in "support" of a school's policies should be generally less distracting[126] and therefore not generally objectionable.[127]

A reasonable administrator might find, for example, all clothing-slogan references to alcohol or drugs or violence more or less equally distracting,[128] regardless of any purported endorsement or criticism. Suppose a student wears a shirt bearing an apparently anti-drug message. Will it be clear to outsiders

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Limitations of a Common Distinction, 60 U. MIAMI L. REV. 333, 342-43 (2006).

121. It would be implausible to defend cases such as *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) or the Illinois Nazi march case of *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978) on the grounds of the insignificance of the harm attributable to the speech. For discussion, see Frederick Schauer, *The Wily Agitator and the American Free Speech Tradition*, 57 STAN. L. REV. 2157 (2005) (reviewing GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH WARTIME: FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM (2004)).

122. For a discussion of contrasts among balancing methodologies, see, e.g., David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641, 693-94 (1994) (endorsing the balancing of all affected constitutional rights against the similarly aggregated governmental or public interests at the level of the transaction in question).

123. *See supra* notes 103-05 and accompanying text.

124. But compare the obvious interests at stake in *Chandler v. McMinnville School District*, 978 F.2d 524, 526, 531 (9th Cir. 1992).

125. *See generally* Wright, *supra* note 120.

126. *See* Newsom *ex rel.* Newsom v. Albemarle County Sch. Bd., 354 F.3d 249, 260 (4th Cir. 2003).

127. *See id.*

128. *See, e.g.*, Guiles *ex rel.* Lucas v. Marineau, 349 F. Supp. 2d 871, 875 (D. Vt. 2004), *aff'd in part, vacated in part*, 461 F.3d 320 (2d Cir. 2006).

whether the student is speaking ironically?[129] Will this generally be more accurately determined by a federal court than by experienced, on-site school administrators who may know the student? Why could not merely ironic "support" of an anti-drug policy be distracting, whatever its overall value as speech? Assuming, by analogy, some overall value in anti-drug advertising campaigns may also seem commonsensical, the positive effects of anti-drug messages may actually be more elusive than some imagine.[130]

No doubt the courts must have the final say with regard to the constitutional dimensions of classroom speech, even when the speech regulation does not seem politically motivated.[131] But public schools can comprise social environments of remarkable subtlety.[132] The better part of wisdom would be to

> avoid too quickly second-guessing, from the quiet confines of a judge's chambers, the complex and difficult decisions made on a daily basis by teachers and school administrators. School authorities are generally in a far better position to understand their students . . . . They are entitled to a healthy measure of deference when exercising judgment, drawing inferences, and reaching conclusions about what is actually going on in their schools and classrooms.[133]

CONCLUSION

Reasonably regulating some distracting student speech may tend, at least in combination with other reforms, to promote basic educational and civic goals of the public schools. At the very least, this possibility is worth judicially experimenting within accordance with the judgments of local school administrations. Of course, the judgments of local school officials who distrust the idea of educational functionalism in this context or a jurisprudence of distracting speech should be respected as well.

Much judicial work remains to be done in clarifying the scope of *Tinker* and succeeding cases regulating unprotected speech categories. The latter categories include speech that is violative of relevant rights or speech that realistically

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129. *See id.* at 876.

130. *See, e.g.*, Ryan Grim, *A White House Drug Deal Gone Bad: Sitting on the Negative Results of a Study of Anti-Marijuana Ads*, SLATE, Sept. 7, 2006, http://www.slate.com/id/2148999/ ("So far, at least, it appears to be pretty much impossible to warn kids away from drugs with an ad campaign, no matter how cautious or nuanced an approach you take. Talking about drugs seems to give enough kids the idea of trying them that drug education efforts regularly backfire.").

131. *See, e.g.*, Pinard v. Clatskanie Sch. Dist. 6J, 446 F.3d 964, 972 (9th Cir.), *amended by* 467 F.3d 755 (9th Cir. 2006); LaVine *ex rel.* LaVine v. Blaine Sch. Dist., 257 F.3d 981, 988 (9th Cir. 2001).

132. Consider, for example, the circumstances and the broader context in *LaVine*. *See LaVine*, 257 F.3d at 988.

133. Governor Wentworth Reg'l Sch. Dist. v. Hendrickson, 421 F. Supp. 2d 410, 425 (D.N.H. 2006).

portends disruption, altercation, physical or other confrontational conflict, impending or likely overt physical disturbance, and disorder.[134] These formulations, however, generate a number of unresolved questions. There are also more ambiguous and perhaps broader occasional references in some of the case law to maintain "appropriate discipline,"[135] to avoid "substantial interference with schoolwork,"[136] or even the "operation of the school."[137] Such language has the potential to be expanded upon. Formulations, if validated and expanded upon in the right ways by the Supreme Court, have some potential to address the problems of speech distraction.

In general, however, the language, examples, imagery, and scenarios in *Tinker* and successor cases do not seem to encompass many cases of "pure" distraction in the absence of something like rights-violation or probable physical disorder. Even if various pure distraction cases could all fit within the scope of *Tinker*'s unprotected categories, the crucial judicial problem would still remain. It makes little difference whether we can fit all of our distraction cases within the scope of, say, "appropriate discipline"[138] or the other looser *Tinker* language if the courts still resist treating significant distraction from curricular and civic learning as permissible grounds for reasonably restricting student speech. Some judicial re-assessment or re-weighing of the various interests at stake, even when the distracting speech is on a matter of public interest, will still be advisable.

Thus, courts should, whatever the rubric, be willing to consider validating the reasonable regulation of significant distraction when that regulation is not counterbalanced by free speech values. Courts should be receptive particularly in light of our often arguably disappointing educational and civic experiences and achievements since roughly the time of *Tinker*'s adoption. Courts should be constitutionally permitted to be responsive to fair-minded decisions of school administrations seeking to promote basic educational and democratic civic values. Free speech itself, after all, clearly functions best on the basis of crucial knowledge, competencies, and values promoted by public schools generally.

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134. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

135. *Id.*

136. *See, e.g.*, Harper *ex rel.* Harper v. Poway United Sch. Dist., 445 F.3d 1166, 1193 (9th Cir.) (Kozinski, J., dissenting) (quoting *Tinker*, 393 U.S. at 511), *reh'g en banc denied*, 455 F.3d 1052 (9th Cir. 2006), *vacated as moot*, 127 S. Ct. 1484 (2007).

137. *See, e.g.*, Ponce v. Socorro Indep. Sch. Dist., 432 F. Supp. 2d 682, 695 (W.D. Tex. 2006).

138. *Tinker*, 393 U.S. at 513.

"OLD STINKING, OLD NASTY, OLD ITCHY OLD TOAD"*: DEFAMATION LAW, WARTS AND ALL (A CALL FOR REFORM)

JULIE C. SIPE**

On May 2, 2007, the Indiana Supreme Court handed down its latest exposition on Indiana's defamation law, *Kelley v. Tanoos*.[1] *Kelley* illustrates the difficulty courts face in deciding defamation cases—the push to provide an overview of defamation as a setting for the outcome of a particular case, and the pull to limit an opinion to its facts, the legal issues raised and developed by the parties, and the narrowest possible ground on which to decide the case. *Kelley*'s overview is a bit too broad because it lists malice as an element of defamation. The opinion is appropriately narrow because it does not tackle the intricacies of actual malice, the fuzzy logic of libel versus slander (and what lies in between), the distinction between defamation per se and defamation per quod, and the issue of presumed damages.

The purpose of this Article is to highlight five ambiguities or conundrums in Indiana defamation law, so that Indiana lawyers can identify the issues as they arise, craft effective arguments promoting clarification of the law, and present them to Indiana's trial and appellate benches. The Author is convinced that intelligent litigation will lead to reform in an area of law that has been called "odd,"[2] "senseless,"[3] and "utterly confusing,"[4] a "hodgepodge,"[5] an "historical accident,"[6] and a "rustic relic[] of ancient asininity"[7] "for which no court and no writer has had a kind word for upwards of a century and a half."[8] "Neither judicial nor academic fatigue can long serve to avoid coming to grips with . . . the chaos that is the modern American law of defamation."[9] This Article will discuss

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* In *Villers v. Monsley*, 95 Eng. Rep. 886, 886 (K.B. 1769), this poem was held to be defamatory because it "render[ed] [the plaintiff] ridiculous."

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In memory of Jacob Corpenny Sipe, III.

1. 865 N.E.2d 593 (Ind. 2007).
2. William L. Prosser, *Libel Per Quod*, 46 VA. L. REV. 839, 839 (1960).
3. *Id.*
4. *Id.* at 840.
5. Grein v. La Poma, 340 P.2d 766, 768 (Wash. 1959).
6. *Id.*
7. Sauerhoff v. Hearst Corp., 538 F.2d 588, 590 n.1 (4th Cir. 1976) (quoting Judge Armstead Dobie).
8. Prosser, *supra* note 2, at 839.
9. Sheldon W. Halpern, *Values & Value: An Essay on Libel Reform*, 47 WASH. & LEE L. REV. 227, 229 (1990).

the following topics: (1) malice as an element; (2) actual malice; (3) the libel/slander distinction; (4) the per se/per quod distinction; and (5) presumed damages, the abolition of which would bring some much-needed order to the chaos that is Indiana defamation law.

I. MALICE AS AN ELEMENT

The facts of *Kelley* sound "ripped from the headlines": Paul Kelley had a "known animosity toward [Daniel] Tanoos."[10] When a shotgun pellet grazed Tanoos's head, Tanoos believed Kelley was the assailant.[11] The police identified Kelley as a suspect, and Kelley's boss sent Tanoos a letter suggesting they meet to discuss the shooting.[12] The police outfitted Tanoos with a wire and questions to ask Kelley's boss.[13] During the course of the conversation, Tanoos said he was "as convinced as the police . . . that Kelley did it," that Kelley failed a polygraph three times, that "everything just started pointing to" Kelley, and that "it all leads back to" Kelley.[14] Kelley was never charged with the shooting.[15] Kelley sued Tanoos for defamation.[16] The trial court granted Tanoos's motion for summary judgment.[17] The Indiana Court of Appeals reversed.[18] The Indiana Supreme Court granted transfer, vacated the Indiana Court of Appeals's opinion, and affirmed the trial court's grant of summary judgment, holding that Tanoos's statements were qualifiedly privileged because they were made to help law enforcement investigate criminal activity.[19]

Kelley states, "[t]o maintain an action for . . . defamation the plaintiff must demonstrate (1) a communication with defamatory imputation; (2) malice; (3) publication; and (4) damages."[20] *Kelley* is not decided on any of the listed elements, but rather on the defense of qualified privilege.[21] In fact, other Indiana cases asserting that malice is an element of a defamation claim have routinely been decided on other grounds, for example, publication, damages, privilege, or truth.[22] What does it mean, then, that courts routinely list malice among the

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10. Kelley v. Tanoos, 865 N.E.2d 593, 595 (Ind. 2007).
11. *Id.*
12. *Id.* at 596.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 602.
20. *Id.* at 596-97 (citing Schrader v. Eli Lilly & Co., 639 N.E.2d 258, 261 (1994)).
21. *Id.* at 597.
22. *See, e.g.*, Lovings v. Thomas, 805 N.E.2d 442 (Ind. Ct. App. 2004) (decided on special damages); Eitler v. St. Joseph Reg'l Med. Ctr., 789 N.E.2d 497 (Ind. Ct. App. 2003) (decided on the defense of absolute privilege); Poyser v. Peerless, 775 N.E.2d 1101 (Ind. Ct. App. 2002) (decided on publication); Gatto v. St. Richard Sch., Inc., 774 N.E.2d 914 (Ind. Ct. App. 2002)

defamation elements, but rarely discuss it?

Kelley's inclusion of malice as an element is based on solid precedent; *Kelley* cites a 1994 Indiana Supreme Court case,[23] which cites a 1992 Indiana Court of Appeals case,[24] which cites a 1982 Indiana Court of Appeals case,[25] and so on, tracing back to the Indiana Legal Encyclopedia published in 1959.[26] Malice as an element is not an invention of the 1950s; in the Middle Ages, *animus* (intent to do wrong) of Roman law, and *malitia* (bad intent) of English ecclesiastical law, were early elements of defamation.[27]

At the start of the nineteenth century, however, the legal community on both sides of the pond began to perceive that malice was not an essential element of defamation.[28] In an 1825 decision, the Court of King's Bench in England said, "'But in an ordinary action for a libel or for words, though evidence of malice may be given to increase the damages, it never is considered as essential, nor is there any instance of a verdict for a defendant on the ground of want of malice.'"[29] In the United States, the Kansas Supreme Court said in 1908, "'it is said that malice is the gist of the action for libel. This is pure fiction. It is not true.'"[30] The Kansas court elaborated that defamatory statements are frequently "published with the best of motives," or "mistakenly or inadvertently," but the "plaintiff recovers just the same."[31]

In 1978, Laurence H. Eldredge agreed with these statements in his treatise *The Law of Defamation*:

> There are cases which say that malice is the "gist" of an action for defamation. . . . Such statements are not only misleading but positively false and they reflect the thoughtless tendency of some courts to keep on repeating a statement which was once the law long after it has ceased to be the law. Malice has not been an element of a cause of action for defamation for more than one hundred years. When courts continue to pay lip service to a long dead rule and to charge juries that "a libel is a malicious publication," and then try to explain it away, all they do is create confusion. The confusion is not limited to jurors. It affects the thinking of the less discriminating lawyers and judges, too.[32]

(decided on the defense of common privilege and truth).

23. *Schrader*, 639 N.E.2d at 261.

24. Rambo v. Cohen, 587 N.E.2d 140, 145 (Ind. Ct. App. 1992).

25. Shallenberger v. Scoggins-Tomlinson, Inc., 439 N.E.2d 699, 704 (Ind. Ct. App. 1982).

26. INDIANA LAW ENCYCLOPEDIA LIBEL AND SLANDER §§ 21-51 (1959).

27. *See* LAURENCE H. ELDREDGE, THE LAW OF DEFAMATION 26 (1978) (citing Nicholas St. John Green, *Slander and Libel*, 6 AM. L. REV. 593, 609 (1872)).

28. *Id.* at 27.

29. *Id.* at 28 (quoting Bromage v. Prosser, 107 Eng. Rep. 1051, 1055 (K.B. 1825)).

30. *Id.* at 29 (quoting Coleman v. MacLennan, 98 P. 281, 291 (Kan. 1908)).

31. *Id.* (quoting *Coleman*, 98 P. at 291).

32. *Id.* at 25. Eldredge explains that the origin of the notion that malice is not an element of defamation is an 1825 decision of the Court of the King's Bench. *Id.* at 27-28.

Indiana Court of Appeals Judge Russell Smith expressed similar sentiments nearly forty years ago: "Malice is not an element of a cause of action for defamation."[33] He explained that there are circumstances in which the law of defamation does not require any intent at all.[34] Judge Smith was right—after the nineteenth century (and until *New York Times Co. v. Sullivan*[35] in 1964), defamation was a "curious compound of [] strict liability imposed upon innocent defendants."[36]

In his treatise, Eldredge asks in exasperation:

> Why, in the name of truth, why, in the name of accurate statement, do presumably learned judges who are handing down from on high the tables of the law to guide their bretheren in the courts below in charging juries and deciding cases, and to guide members of the Bar and all others who seek enlightenment—why do such judges keep on writing "a libel is a malicious publication"?[37]

The Author encourages lawyers and judges to do otherwise.[38]

II. ACTUAL MALICE: WHAT DOES IT MEAN, WHEN DOES IT APPLY, AND WHO DECIDES IT?

A. What Does Actual Malice Mean?

The garden-variety malice discussed above should not be confused with "actual malice," the constitutional privilege that was created and applied by the U.S. Supreme Court in *New York Times Co. v. Sullivan*.[39] Before *New York Times*, defamation was a strict liability tort,[40] the parameters of which were

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33. Hotel & Rest. Employees & Bartenders Int'l Union v. Zurzolo, 233 N.E.2d 784, 791 (Ind. App. 1968). Judge Smith also mentioned that "both parties to th[e] appeal debated [the issue of malice] enthusiastically and with passion, but without regard to reason." *Id.*

34. *Id.* ("The defendant may be held strictly liable for an innocent or negligent defamation without proof that he intended the consequences." (citing RESTATEMENT (FIRST) OF TORTS §§ 579, 580 (1938))).

35. N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

36. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 111, at 771 (5th ed. 1984).

37. ELDREDGE, *supra* note 27, at 29.

38. *Id.* at 25.

39. *N.Y. Times*, 376 U.S. at 283-84. Although defamation has traditionally been a matter for state governments, the U.S. Supreme Court in *New York Times* and its progeny has held that the First Amendment today requires most plaintiffs to establish some kind of fault to recover for defamation. *See id.* U.S. Supreme Court cases since *New York Times* have added complexities to the federal constitutional overlay on state defamation law that bind the states' formulations of defamation.

40. *See id.*; *see also* Diane Leenheer Zimmerman, *Musings on a Famous Law Review Article:*

decided by the states. In *New York Times*, an Alabama police chief sued a newspaper for publishing a paid advertisement that alleged that the chief maltreated African-American students who were protesting segregation.[41] The trial court instructed the jury that malice was implied, and the Alabama Supreme Court upheld judgment for the plaintiff.[42] The U.S. Supreme Court reversed, holding that, although defamation is a matter traditionally left to the states, the free speech rights guaranteed by the First Amendment to the U.S. Constitution required a federally imposed minimum fault standard.[43] Writing for the majority, Justice Brennan said, "we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[44] The Court concluded that the plaintiff had to prove "actual malice."[45]

So, what is actual malice? Some lawyers might assume that actual malice means real malice, or what Black's Law Dictionary calls "express malice," that is, "ill will or wrongful motive."[46] *New York Times*, however, defined actual malice in terms of knowledge: "with knowledge that [a statement] was false or with reckless disregard of whether it was false or not."[47]

What does "reckless disregard" mean? Reckless disregard is difficult to define, even in areas of law less murky than defamation. It can mean indifference to the consequences, wantonness, or willfulness.[48] The Restatement (Second) of Torts says that recklessness in the general tort context involves two types of conduct: (1) the actor knows or has reason to know of facts that create a high probability of harm to another and deliberately acts (or fails to act) in

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The Shadow of Substance, 41 CASE W. RES. L. REV. 823, 824 n.9 (1991).

41. *See N.Y. Times*, 376 U.S. at 256.

42. *Id.* at 262-63.

43. *Id.* at 279-80.

44. *Id.* at 270 (citing Terminiello v. Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).

45. *Id.* at 279-80.

46. BLACK'S LAW DICTIONARY 957 (6th ed. 1990).

47. *N.Y. Times*, 376 U.S. at 280. There is reason to think, however, that ill will evidence may be admissible to prove actual malice. In *Indianapolis Newspapers, Inc. v. Fields*, 259 N.E.2d 651 (Ind. 1970), a sheriff sued a newspaper for publishing articles alleging brutality in jail. *Id.* at 656-57. The trial court entered judgment for the sheriff. *Id.* at 656. On appeal, then-Justice Given recused himself. *Id.* at 655. The remaining four justices split equally about whether to reverse or affirm the trial court. *Id.* at 655-56. Pursuant to appellate rule, the trial court was affirmed. *Id.* at 656. In his opinion to affirm, Justice DeBruler wrote:

> Appellant's argument is that ill will evidence is not *admissible* on the issue of whether appellant published with reckless disregard for the truth. We believe that it is relevant and admissible on that issue. It is true that ill will evidence does not tend to prove that appellant had *knowledge* of the falsity of its publications. However, actual malice may consist in a "high degree of awareness of their probable falsity."

Id. at 664 (quoting Garrison v. Louisiana, 379 U.S. 64, 74 (1964)).

48. *See* BLACK'S LAW DICTIONARY, *supra* note 46, at 1270-71.

conscious disregard of, or indifference to, the risk; and (2) the actor knows or has reason to know of the facts, but does not realize or appreciate the risk, although a reasonable person would do so.[49]

The U.S. Supreme Court "explained" the defamation-specific meaning of "reckless disregard" in *St. Amant v. Thompson*,[50] stating that the touchstone of actual malice is "an awareness . . . of the probable falsity of [the] statement."[51] The Court went on to say that "reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."[52] Reckless disregard, according to the U.S. Supreme Court, requires proof of actual, subjective doubts.

In the legal construct of defamation, then, "actual malice" does not mean ill will, and "reckless disregard" does not mean unreasonable inattention to potential consequences. So why use these terms at all? The evolution of modern U.S. and Indiana defamation jurisprudence has been shaped by terms of art borrowed from other areas and redefined. This appropriation and redefinition was an attempt to strike a balance between freedom of speech guaranteed by our state and federal constitutions and the right to recovery for harm enshrined in American common law (which are in turn borrowed in large part from England). A persuasive argument can be made for abandoning these terms of art for straightforward definitions of what a plaintiff must prove.

B. When Does Actual Malice Apply? (And What Is the Standard When Actual Malice Does Not *Apply?)*

To further confuse things, the actual malice standard does not apply in all cases. The U.S. Supreme Court's line of defamation cases sets the standard of fault based on the type of plaintiff (public or private), defendant (media or non-media), and concern at issue (public or private). In *New York Times*, the Court held that a public official (the police chief) suing a member of the media (the newspaper) for publishing a matter of public concern (the chief's alleged civil rights abuses) had to prove actual malice.[53]

In *Gertz v. Robert Welch, Inc.*,[54] the U.S. Supreme Court decided that each state should choose its own fault standard for cases involving private plaintiffs because First Amendment concerns are reduced in comparison to cases involving plaintiffs who are public officials or public figures.[55] The Indiana Court of

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49. RESTATEMENT (SECOND) OF TORTS § 500 cmt. a (1965); *but see* Bowman *ex rel.* Bowman v. McNary, 853 N.E.2d 984, 994-95 (Ind. Ct. App. 2006) (criticizing § 500 cmt. a).

50. 390 U.S. 727, 730-31 (1968).

51. *Id.* at 732-33.

52. *Id.* at 731.

53. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 283 (1964).

54. 418 U.S. 323 (1974).

55. *Id.* at 347-48.

Appeals chose its standard in *Aafco Heating & Air Conditioning Co. v. Northwest Publications, Inc.*,[56] in which it applied the actual malice standard in a case involving a private figure plaintiff (a heating company), a media defendant (a newspaper), and a matter of public concern (an alleged failure to install properly a furnace that killed two children).[57] The Indiana Supreme Court also applied the actual malice standard in *Journal-Gazette Co. v. Bandido's, Inc.*,[58] a case involving a public figure plaintiff (a restaurant), a media defendant (a newspaper), and a matter of public or general concern (rodent droppings were allegedly found in the restaurant).[59]

It is unclear what standard Indiana courts will apply to cases involving private figure plaintiffs, non-media defendants, and/or private concerns. In *Beeching v. Levee*,[60] a case involving a private plaintiff (an elementary school principal), a non-media defendant (a teacher's bargaining unit representative), and a matter of private concern (calling the principal a liar in a meeting with teachers), the Indiana Court of Appeals held that the "higher defamation standard in *Bandido[']s*" (i.e., actual malice) does not apply.[61] The Indiana Court of Appeals did not, however, specify what standard of fault *would* apply because it did not need to reach that issue.[62]

Clues may be found in the dissenting opinions in *Bandido's* written by Chief Justice Shepard and Justice Dickson. In his *Bandido's* dissent, Justice Dickson stated (and Chief Justice Shepard agreed) that, in a private figure plaintiff, media defendant, private concern case, he would make negligence the standard: "I respectfully dissent from the majority opinion as to its disapproval of Indiana's traditional common law standard . . . 'negligence' . . . in private defamation cases against media defendants."[63] In his concurring opinion, Justice Boehm appears to agree that negligence would be the standard: "[R]estricting the actual malice requirement to publications on subjects of public concern will leave the vast majority of the six million Hoosiers for whom Chief Justice Shepard expresses concern subject to a simple negligence standard for defamation."[64]

In his *Bandido's* dissent, Chief Justice Shepard implied (and Justice Dickson concurred) that, in the case of a private figure plaintiff, a non-media defendant, and a private concern, he would set the standard very low: "If somebody posts scandalous and defamatory material about a Hoosier on the internet, sending it

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56. 321 N.E.2d 580 (Ind. App. 1974).

57. *Id.* at 582-83, 586.

58. 712 N.E.2d 446 (Ind. 1999).

59. *Id.* at 449-50. The *Bandido's* court held that the restaurant was a limited purpose public figure, or a public figure for the purpose of issues concerning a report on rodent droppings in the restaurant and the subsequent closing of the restaurant, because the restaurant did not challenge that classification at trial. *Id.* at 454.

60. Beeching v. Levee, 764 N.E.2d 669 (Ind. Ct. App. 2002).

61. *Id.* at 680.

62. *See id.*

63. *Bandido's*, 712 N.E.2d at 473 (Dickson, J., dissenting).

64. *Id.* at 471 (Boehm, J., concurring).

all over the world, the victim may gain redress simply by showing that the defamation occurred (and, most likely, by responding effectively to the defense of truth)."[65] This sounds like strict liability (or liability without scienter), but *Gertz* says the U.S. Constitution requires more: "We hold that, *so long as they do not impose liability without fault*, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."[66]

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,[67] however, decided after *Gertz*, may leave the door open for strict liability in private figure cases involving matters that are of private concern.[68] In *Dun & Bradstreet*, the private figure plaintiff (a construction contractor) sued a non-media defendant (a credit reporting agency) on a matter of private concern (a report that the contractor filed for bankruptcy).[69] Because the plaintiff proved fault, but not actual malice, the question of whether states may permit defamation recovery without proof of fault, i.e., strict liability, was not at issue, and has not yet been resolved by the U.S. Supreme Court.[70]

To summarize, there are at least four different kinds of defamation cases: (1) those involving a public official or public figure; (2) those involving a private figure and a matter of public concern; (3) those involving a private figure, a media defendant, and a matter of private concern; and (4) those involving a private figure, a non-media defendant, and a matter of private concern. The applicable standards in some of these cases remain unknown because lawyers have not litigated all of these circumstances in Indiana appellate courts. Nonetheless, it is clear that actual malice applies in the first two cases.[71] An educated guess puts the fault standard at negligence for the third scenario and it could be as low as strict liability for the fourth.

C. Who Decides Actual Malice?

Although the U.S. Supreme Court has never said so, a number of federal appeals court cases have expressly stated that actual malice is a question of fact at trial.[72] On appeal, however, whether the evidence supports a finding of actual

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65. *Id.* at 471-72 (Shepard, C.J., dissenting).

66. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974) (emphasis added).

67. 472 U.S. 749 (1985).

68. *Id.* at 756.

69. *Id.* at 751.

70. *See, e.g.*, Rodney A. Smolla, Dun & Bradstreet, Hepps, & Liberty Lobby*: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1545-46 (1987).

71. Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Journal-Gazette Co. v. Bandido's, Inc., 712 N.E.2d 446 (Ind. 1999); Aafco Heating & Air Conditioning Co. v. Nw. Publ'ns Inc., 321 N.E.2d 580 (Ind. App. 1974).

72. *See, e.g.*, Bichler v. Union Bank & Trust Co., 745 F.2d 1006, 1010-11 (6th Cir. 1984); Fitzgerald v. Penthouse Int'l, Ltd., 691 F.2d 666, 668 (4th Cir. 1982); Dombey v. Phoenix Newspapers, Inc., 724 P.2d 562, 572 (Ariz. 1986); Knudsen v. Kan. Gas & Elec. Co., 807 P.2d 71,

malice is a question of law.[73] The reason for this distinction is that "[j]udges, as expositors of the Constitution," have a duty to "independently decide whether the evidence in the record is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof of 'actual malice.'"[74] So actual malice is neither a question of fact nor a question of law; it is both.

III. LIBEL VS. SLANDER (AND WHAT LIES IN BETWEEN)

As with "malice is an element of defamation," the distinction between libel and slander has been repeated (and repeated) without thoughtful analysis: "slander is oral, libel is written." That distinction has never been adequate to distinguish the two types of defamation under all sets of facts. What about the nod of a head? Or a speech that will be transcribed or recorded?

The problem with the distinction is in the very nature of the definitions. In Venn Diagrammatic[75] terms, the most precise, complete definition of the defamation universe would be to divide the universe in half. The first subset would be oral communications, and its complement would be all communications that are *not* oral. Alternatively, the first subset could be written communications, and its complement would be all communications that are *not* written. Using two descriptors, both written and oral, to demarcate the defamation universe utterly fails to define communications that are neither written nor oral, and it fails to define precisely communications that are both.

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81 (Kan. 1991); Tucci v. Guy Gannett Publ'g Co., 464 A.2d 161, 170 (Me. 1983); Lyons v. New Mass Media, Inc., 453 N.E.2d 451, 456 (Mass. 1983).

73. Harte-Hanks Commc'ns, Inc. v. Connaughton, 491 U.S. 657, 685 (1989) (citing Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 510-11 (1984)).

74. *Bose*, 466 U.S. at 511.

75. A Venn Diagram is "a diagram that uses circles to represent sets and their relationships." DICTIONARY.COM UNABRIDGED (v.1.1), http://dictionary.reference.com/browse/venn diagram (last visited June 27, 2007).

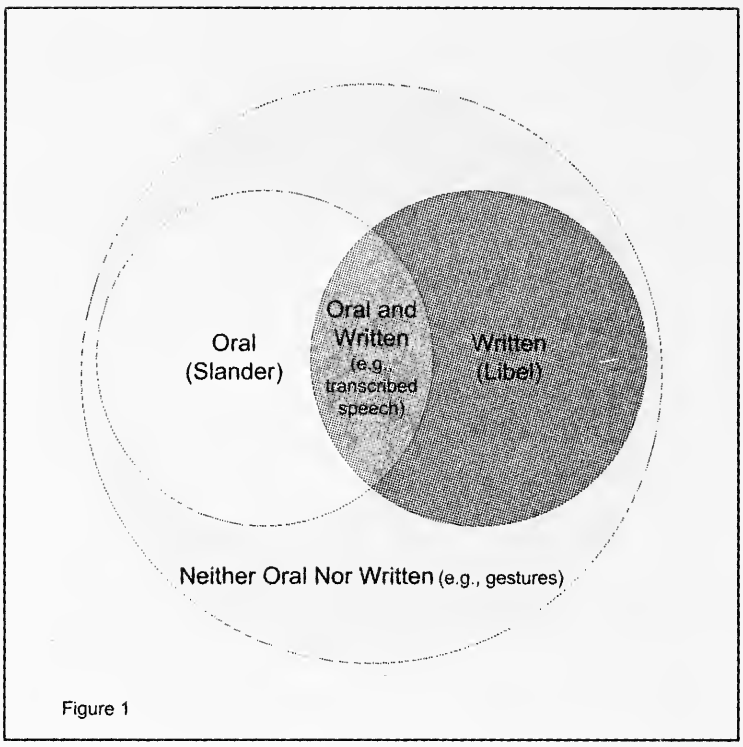

Figure 1

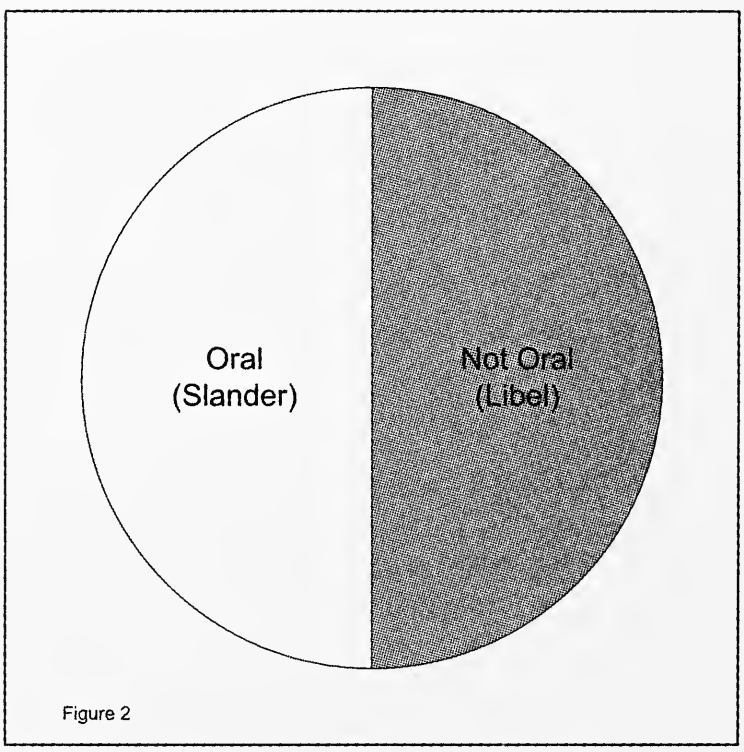

Figure 2

Figure 1 illustrates the current inexact definitions of libel and slander, while Figure 2 depicts precise definitions of those terms.

"For two centuries and a half the common law has treated the tort of defamation in two different ways on a basis of mere form."[76] In libel cases,

76. RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977).

harm is presumed; therefore, no proof of actual harm is required.[77] In most slander cases,[78] on the other hand, the plaintiff's case fails without proof of pecuniary harm, even if a real loss of reputation occurred.[79] "This anomalous and unique distinction is in fact a survival of historical exigencies in the development of the common law jurisdiction over defamation."[80] In the Middle Ages and thereafter, different types of English courts (ecclesiastical, common law, Roman, royal Star Chamber) had jurisdiction over different parts of what we now call defamation.[81] The common law courts absorbed much of the defamation jurisdiction of the other courts and absorbed many of the rules created by those different courts for different purposes, despite the fact that those rules were complicated and contradictory.[82] Among those rules was the distinction between libel and slander, which, like "malice is an element of defamation," was repeated over the years.[83] The distinction then became settled law on the ground that "although indefensible in principle, [it] was too well established to be repudiated."[84]

William Prosser has said of the distinction:

> Of all the odd pieces of bric-a-brac upon exhibition in the old curiosity shop of the common law, surely one of the oddest is the distinction between the twin torts of libel and slander. . . . Arising out of old and long forgotten jurisdictional conflicts, and frozen into its present form in the seventeenth century by the rising tide of sentiment in favor of freedom of speech and of the press, it remains a senseless thing, for which no court and no writer has had a kind word for upwards of a century and a half.[85]

The Restatement goes a bit further, stating that "no respectable authority has ever attempted to justify the distinction on principle,"[86] yet there are theories for why the distinction was originally developed. One is that "written defamation has a more extended circulation than spoken words."[87] More than a century ago, however, it was argued that defamation "within the narrow circle of one's associates" is far more damaging than defamation to unknown others,[88] and that "more harm is done to character by whispered than by

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77. *See* DAN B. DOBBS, THE LAW OF TORTS § 409, at 1144 (2000).
78. There is a distinction between slander and slander per se. *See infra* Part IV.
79. DOBBS, *supra* note 77, § 408, at 1143.
80. RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977).
81. *See id.*
82. *See id.*
83. *Id.*
84. *Id.*
85. Prosser, *supra* note 2, at 839.
86. RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977).
87. *Slander and Libel*, 6 AM. L. REV. 593, 594 (1872).
88. *Id.*

outspoken malice."[89] Another supposed reason for the distinction: libel is more likely to cause a breach of the peace than slander.[90] But again, in words over a century old, "[t]he tongue . . . has caused more bloodshed than the pen ever did."[91]

If anything, the distinction between libel and slander has become more indefensible over the past centuries, with the development of new methods of communication and publication, from the photograph and the telegraph to MySpace[92] and YouTube.[93] In 1966, for example, the Indiana Court of Appeals declined to determine whether a radio broadcast of a conversation was slander or libel, and decided the case on other grounds.[94] Other "courts have condemned the distinction as harsh and unjust,"[95] perhaps because a plaintiff suing for a written statement on a letter sent to a single person is entitled to presumed damages, while a plaintiff suing for a spoken statement to thousands may not be so entitled. Some courts have even abolished the distinction.[96] Writing for the Washington Supreme Court, Justice Weaver said:

> It is . . . apparent that the hodgepodge of the law of slander is the result of historical accident for which no reason can be ascribed. It is time that the matter be righted. There ought not to be any distinction between oral and written defamation. It is entirely a matter of judge-made law, and English judges at that.[97]

Research reveals no Indiana cases since the turn of the millennium that were decided on the distinction between libel and slander. In fact, Indiana cases have begun discussing slander and libel in more general terms. For example, in *Branham v. Celadon Trucking Services, Inc.*,[98] the plaintiff sued for libel, and the Indiana Court of Appeals began its discussion by saying, "Libel is a species of defamation under Indiana law. Defamation is that which

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89. *Id.*

90. *Id.*; *see also* RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977) (discussing the origin of the breach of the peace theory).

91. *Slander and Libel*, *supra* note 87, at 594.

92. MySpace describes itself as "an online community that lets you meet your friends' friends." MySpace.com, About Us, http://www.myspace.com/Modules/Common/Pages/AboutUs.aspx (last visited July 2, 2007). Members can post messages and multimedia content, including copyrighted photos and videos, on webpages visible to other members and the public. *See Old Mogul, New Media*, ECONOMIST, Jan. 21, 2006, at 68.

93. YouTube is a website that allows people "to watch and share original videos worldwide through a Web experience." YouTube, About YouTube, http://www.youtube.com/t/about (last visited July 2, 2007).

94. Gibson v. Kincaid, 221 N.E.2d 834, 841-42 (Ind. App. 1966) (Faulconer, J, concurring).

95. RESTATEMENT (SECOND) OF TORTS § 568 cmt. b (1977).

96. Grein v. La Poma, 340 P.2d 766, 768 (Wash. 1959).

97. *Id.*

98. 744 N.E.2d 514 (Ind. Ct. App. 2001).

tends to injure reputation or to diminish esteem, respect, goodwill or confidence in the plaintiff, or to excite derogatory feelings or opinions about the plaintiff."[99] The court did not use the term libel again in the opinion. Likewise in *Kelley*, the Indiana Supreme Court spoke only of defamation, and Justice Sullivan used the terms "slander" and "libel" only once, in a citation.[100]

If Indiana courts are moving away from the indefensible distinction between slander and libel, it is in part because Indiana lawyers are not framing their cases in those terms. Logical jurisprudence demands that lawyers move a step further and advocate the repudiation of the distinction.

IV. PER SE VS. PER QUOD

The defendant in *Kelley* did advocate the repudiation of an ancient, illogical distinction in defamation law—the distinction between defamation per se and defamation per quod.[101] His able counsel[102] argued that Indiana should join three states (Missouri, Kansas, and Arkansas) that have abolished the per se/per quod distinction, and a fourth state (New Jersey) that would do so under the right circumstances, "because the historical considerations underlying the [distinction] are no longer valid."[103] The Indiana Supreme Court decided the case on other grounds.[104]

As the defendant in *Kelley* explained, the per se/per quod distinction relates to damages. "In cases of defamation *per se*, the jury may presume damages because 'the law presumes the plaintiff's reputation has been damaged, and the jury may award a substantial sum for this presumed harm, even without proof of actual harm.'"[105]

So what is the distinction, exactly? The Indiana Court of Appeals explained that generally, "'[p]er se' is used to designate words whose defamatory nature appears without consideration of extrinsic facts."[106] In *Kelley*, the Indiana Supreme Court stated its own definition of "per se": "A communication is defamatory *per se* if it imputes: (1) criminal conduct; (2) a loathsome disease; (3) misconduct in a person's trade, profession, office, or occupation; or (4) sexual misconduct."[107] The roots of this definition lie in the

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99. *Id.* at 522 (citations omitted).

100. Kelley v. Tanoos, 865 N.E.2d 593, 598 (Ind. 2007).

101. Appellee's Petition for Transfer at 9, *Kelley*, 865 N.E.2d 593 (No. 84S01-0605-CV-195).

102. Bryan H. Babb, George T. Patton, and Robert B. Clemens of Indianapolis, Indiana.

103. Appellee's Petition for Transfer, *supra* note 101, at 9.

104. *Kelley*, 865 N.E.2d at 597.

105. Glasscock v. Corliss, 823 N.E.2d 748, 757 (Ind. Ct. App. 2005) (quoting Rambo v. Cohen, 587 N.E.2d 140, 145 (Ind. Ct. App. 1992)).

106. Hotel & Rest. Employees & Bartenders Int'l Union v. Zurzolo, 233 N.E.2d 784, 790 (Ind. App. 1968).

107. *Kelley*, 865 N.E.2d at 596 (citing *Rambo*, 587 N.E.2d at 145). *Trail v. Boys & Girls Clubs of Northwest Indiana*, 845 N.E.2d 130, 137 (Ind. 2006), uses this same definition.

Restatement (Second) of Torts § 570, which lists those elements, more or less: "(a) a criminal *offense* . . . , (2) a loathsome disease . . . , (c) matter *incompatible* with [the plaintiff's] business, trade, profession, or office . . . , or (d) *serious* sexual misconduct."[108] The Restatement does not speak of defamation per se, but rather *slander* actionable without proof of special harm, despite its acknowledgment that the libel/slander distinction is indefensible.[109] The Restatement has a separate section for libel that says that *all libel* is actionable without proof of special harm.[110]

Older Indiana case law is even more complicated. In 1967, the Indiana Court of Appeals stated:

> It is generally agreed that words are actionable without allegation and proof of special damage when:
> (1) Words, whether they be in the form of libel or slander, which are defamatory *per se* or *per quod*, which (a) impute to another the commission of an indictable offense punishable by imprisonment; (b) impute to another a loathsome disease; (c) tend to injure another in his office, profession, trade, business or calling; or (d) impute unchastity to a woman.
> (2) Words in the form of libel which, on their face, without resort to extrinsic facts or circumstances, that is to say, "*per se*" tend to degrade another person, impeach his honesty, integrity, or reputation, or bring him into contempt, hatred, ridicule, or causes him to be shunned or avoided.[111]

In 1968, the Indiana Court of Appeals explained the distinction slightly differently:

> When we say that words are actionable only upon proof of "special" damage, we mean special in the sense that it must be supported by specific proof, as distinct from the damage assumed to follow in the case of libel per se, or libel per quod which falls into one of the four special categories of slander per se. In other words, special damages must be proved in the case of slander or libel per quod that does not involve the imputation of a crime, a loathsome disease, unchasity, or injury to the plaintiff's business, profession, trade or office.[112]

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108. RESTATEMENT (SECOND) OF TORTS § 570 (1977) (emphases added). The court determines whether spoken language imputing a crime, disease, or sexual misconduct is of such a character to be actionable per se. *Id.* § 615(1). "Subject to the control of the court," the jury determines whether spoken language imputes business misconduct, so that the slander would be actionable per se. *Id.* § 615(2).

109. *Id.* § 570.

110. *Id.* § 569.

111. Gibson v. Kincaid, 221 N.E.2d 834, 843 (Ind. App. 1966) (Faulconer, J., concurring).

112. Hotel & Rest. Employees & Bartenders Int'l Union v. Zurzolo, 233 N.E.2d 784, 790 (Ind. App. 1968) (quoting CHARLES TILFORD MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 44

Unraveling the meaning of these varied definitions is, to quote Prosser, "a trifle sticky."[113] One commentator stated, "[N]o concept in the law of defamation has created more confusion."[114] Another said that "it contributes 'an additional complexity to a subject already overburdened with rules holding over long after the judicial rivalries which have produced them have been forgotten,' and . . . it has proved to be utterly confusing to some generations of courts and lawyers, to say nothing of the bewildered law student."[115] The Fourth Circuit has even apologized for the distinctions: "Throughout this opinion the terms per se and per quod will be employed . . . even though they may be . . . 'rustic relics of ancient asininity.'"[116] Should we maintain a distinction for which we must apologize?

What does "per se" mean today in Indiana, anyway? Does it mean the method by which defamation is proved (without reference to extrinsic evidence), or does it mean a communication that falls within four categories (crime, disease, business misconduct, or sexual misconduct)? Does it mean words that subject others to contempt, hatred, ridicule, or shunning? If Indiana courts retain the libel/slander distinction, does it matter whether libel is per se or per quod?

The issue is not whether a statement is defamatory per se or per quod; these are merely terms that have been imprecisely and inconsistently defined. The real issue is when damages may be presumed. Four decades ago, Indiana cases drew a bright line regarding proof of damages: "If the subject matter of an alleged defamation is not defamatory per se, special damages must be alleged in the complaint."[117] In 2005, however, the Indiana Court of Appeals smudged the line when it rejected the forty-year-old precedent and permitted a plaintiff to recover more than $100,000 without proof of special damages.[118] The Indiana Court of Appeals's rationale for allowing recovery: the jury *could* have believed that the statements in question were defamatory per se.[119] If modern decisions make it easier to presume damages, then why have the per se/per quod distinction at all? Why even use the terms? More advocacy is needed to press the issue.

(1935); WILLIAM L. PROSSER, HANDBOOK ON THE LAW OF TORTS 788 (3d ed. 1964)).

113. Prosser, *supra* note 2, at 840.

114. ROBERT D. SACK, LIBEL, SLANDER, AND RELATED PROBLEMS 94 (1980).

115. Prosser, *supra* note 2, at 840 (quoting MCCORMICK, *supra* note 112, at 418).

116. Sauerhoff v. Hearst Corp., 538 F.2d 588, 590 n.1 (4th Cir. 1976) (quoting Judge Armstead Dobie).

117. Gibson v. Kincaid, 221 N.E.2d 834, 836 (Ind. App. 1966) (citing Patton v. Jacobs, 78 N.E.2d 789 (Ind. App. 1948); *see also Zurzolo*, 233 N.E.2d at 790 ("[I]n the absence of words actionable per se, special damages must be alleged in the complaint.")

118. Glasscock v. Corliss, 823 N.E.2d 748, 757-58 (Ind. Ct. App. 2005).

119. *Id.* at 758.

V. PRESUMED DAMAGES: WHEN AND WHY?

A. When?

Whether a case involves libel or slander, per se or per quod, there is at least one more conundrum in defamation law: when may damages be presumed?

Defamation damages traditionally involve five subparts: (1) nominal damages ("'a trivial sum of money awarded'" when a plaintiff "'has not established that he is entitled to compensatory damages'"), (2) general damages for harm to reputation (called "general," because they are generally anticipated, and hence do not need to be alleged), (3) damages for special harm (the "'loss of something having economic or pecuniary value,'" such as loss of business), (4) damages for emotional distress (and bodily harm resulting therefrom), and (5) punitive damages (to punish a defendant's outrageous conduct).[120]

Before the U.S. Supreme Court decided *Gertz* and *Dun & Bradstreet*, the threshold damages questions were: (1) whether the allegedly defamatory communication was libel or slander, and, if slander, (2) whether the communication was slander or slander per se. If a court[121] determined that the communication was slander, the jury could limit its award to nominal damages (usually if there was no substantial loss to reputation),[122] or the jury could award "special damages" for pecuniary loss (if the plaintiff produced sufficient evidence of that financial harm).[123] If, and only if, the jury determined that the plaintiff was entitled to special damages, could the jury also award damages for general loss of reputation,[124] emotional distress resulting from the loss of reputation,[125] and punitive damages, if the defendant's conduct was sufficiently outrageous.[126] If, on the other hand, the communication was libel or slander per se, the jury could limit its award to

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120. Russ VerSteeg, *Slander & Slander Damages After* Gertz *and* Dun & Bradstreet, 38 VILL. L. REV. 655, 663-69 (1993) (footnotes omitted). As to the potential absurdity of proving special damages, one case even held that a plaintiff who proved that his wife left him because of an allegedly defamatory statement about his "girlfriend" not only failed to show special damages, but actually proved his opponent's argument for summary judgment. Sauerhoff v. Hearst Corp., 388 F. Supp. 117, 122-25 (D. Md. 1974), *vacated on other grounds*, 538 F.2d 588 (4th Cir. 1976). The court held as a matter of law that the plaintiff suffered no special harm because the plaintiff's evidence showed that his wife was a net financial burden! *Id.*

121. Whether a statement is slander or slander per se is generally a question for the court. RESTATEMENT (SECOND) OF TORTS § 615 (1977).

122. *Id.* § 620.

123. *Id.* § 575 cmt. a.

124. *Id.*

125. *Id.* § 575 cmt. c.

126. KEETON ET AL., *supra* note 36, § 116A, at 845.

nominal damages as well.[127] The jury could also award substantial sums for general damages,[128] emotional distress,[129] and punitive damages,[130] even if the plaintiff did not prove that he or she suffered actual, financial harm. Moreover, even if the plaintiff did not prove general damages or emotional distress damages, juries awarded these damages for harm to reputation and emotion that would normally be assumed to flow from a defamatory publication of the nature involved.[131] If the plaintiff did prove that the defamation legally caused actual, financial harm, the jury could also award special damages for that harm.[132]

Indiana courts still adhere to these traditional rules to a large extent. The Indiana Supreme Court said in *Kelley*, "[i]n an action for defamation *per se* the plaintiff 'is entitled to presumed damages "as a natural and probable consequence" of the *per se* defamation.' In an action for defamation *per quod*, the plaintiff must demonstrate special damages."[133] "[A] plaintiff in a *per quod* defamation action can recover for emotional and physical harm only upon a showing of special damages. Emotional and physical harms are not special damages unto themselves, but rather are parasitic damages, viable only when attached to normal (i.e., pecuniary) special damages."[134] "The parasitic damages ride along with special damages; if special damages are alleged and proved, recovery for parasitic damages is possible; if special damages are not alleged and proved, there can be no recovery for parasitic damages."[135] It is unclear whether a plaintiff must prove these "parasitic" damages to recover for them. It is likewise unclear whether general damages and punitive damages are "parasitic," and whether the plaintiff must prove them.

Decided more than thirty years before *Kelley*, however, U.S. Supreme Court precedent draws these traditional damages rules into question. In *Gertz*, the U.S. Supreme Court said, "[T]he States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth,"[136] in other words, actual malice. A decade after *Gertz*, the U.S. Supreme Court limited that statement in *Dun & Bradstreet*: "[In *Gertz*] we held that a State could not

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127. RESTATEMENT (SECOND) OF TORTS § 620 (1977). Usually in libel or slander per se cases, juries award nominal damages when the defamation was insignificant, no substantial harm was done to the plaintiff, or they are the only damages claimed. *Id.*

128. *Id.* § 621.

129. *Id.* § 623.

130. KEETON ET AL., *supra* note 36, § 116A, at 845.

131. RESTATEMENT (SECOND) OF TORTS §§ 621, 623 (1977).

132. *Id.* § 622.

133. Kelley v. Tanoos, 865 N.E.2d 593, 597 (Ind. 2007) (citations omitted).

134. Rambo v. Cohen, 587 N.E.2d 140, 146 (Ind. Ct. App. 1992) (citations omitted).

135. *Id.*; *see also* Cortez v. Jo-Ann Stores, Inc., 827 N.E.2d 1223, 1231 (Ind. Ct. App. 2005) ("If a plaintiff in a defamation per quod case cannot demonstrate pecuniary damages, then the plaintiff cannot recover for emotional and physical harm.").

136. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

allow recovery of presumed and punitive damages absent a showing of 'actual malice,'"[137] but "[i]n light of the reduced constitutional value of speech involving no matters of public concern, we hold [today] that the state interest adequately supports awards of presumed and punitive damages—even absent a showing of 'actual malice.'"[138] To summarize, *Gertz* and *Dun & Bradstreet* appear to mean that, in cases involving matters of public concern, presumed and punitive damages are recoverable only if the plaintiff proves actual malice.[139] In cases involving matters that are not of public concern, presumed and punitive damages may be recoverable without proof of actual malice,[140] although it is not clear whether the plaintiff must prove fault or may recover under a strict liability theory.[141]

Applying these rules to the five categories of damages leads to an entirely different analysis of defamation damages. There should be two threshold questions: (1) whether the allegedly defamatory communication was a matter of public concern, and, if so, (2) whether the defendant acted with actual malice.[142] If the communication did not involve a matter of public concern, then traditional defamation damages rules apply.[143] If the communication involved a matter of public concern, then the jury must decide whether the defendant acted with actual malice.[144] If the defendant acted with actual malice, then the jury may be able to award nominal, general, special, emotional,[145] and punitive damages. If the defendant did *not* act with actual malice, the jury may award damages for "actual injury," but only if the plaintiff proves the injury and the damages.[146] This is an entirely new

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137. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756 (1985).

138. *Id.* at 761.

139. It is unclear whether the type of plaintiff has an impact on when and how a plaintiff may collect damages. The U.S. Supreme Court has required actual malice for public official or public figure plaintiffs to collect any type of damages, even actual damages. *See, e.g.*, Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967) (public figure); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (public official). Those public plaintiff/actual malice cases, however, also involved matters of public concern.

140. *Dun & Bradstreet, Inc.*, 472 U.S. at 761.

141. To make matters even more complicated, the holding in *Gertz* may be limited to media defendants. *See Gertz*, 418 U.S. at 341-47. This means that there may be a third category of cases—matters of public concern published by non-media defendants—in which it remains unclear whether the actual malice standard would apply.

142. VerSteeg, *supra* note 120, at 686-87.

143. *Id.* at 687.

144. *Id.* "Whether a statement should be characterized as [a matter of public concern] is probably a question of law." *Id.*

145. Whether a plaintiff may recover damages for emotional distress in a defamation action in Indiana without proving the tort of infliction of emotional distress is beyond the scope of this Article.

146. *Gertz*, 418 U.S. at 349 ("[I]t is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury.").

category of damages defined in *Gertz*: "Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[147]

Few Indiana cases involving First Amendment concerns even recognize the *Gertz* and *Dun & Bradstreet* overlays on the traditional defamation damages rules. One case that acknowledged the issue, *Elliott v. Roach*,[148] decided the case on other grounds.[149] Others merely recite the old damages rules without reference to *Gertz* or *Dun & Bradstreet* at all.[150] One commentator stated, "[I]t is both puzzling and disappointing that the judiciary has continued to apply the traditional ordinary slander/slander *per se* dichotomy, and has failed to apply the rules set forth in the[] landmark decisions" of *Gertz* and *Dun & Bradstreet*.[151] These rules must be brought to the attention of the Indiana bench.

B. Why?

There is an even more fundamental question. Why presume damages in any type of defamation case? As Justice Sullivan asked in the *Kelley* oral argument, "Is this a doctrine that has outlived its usefulness?"[152] Should the judicial system concern itself with disputes over reputations that have not suffered any real harm? Are the cases in which damages are presumed really more serious? As Prosser said:

> It has never made any sense whatever that it is actionable to write that the plaintiff is a damned liar on a postcard read by a single third person, or to say in a newspaper line that a woman wears a funny hat, but that it is not actionable to say the same things in a speech to a large audience . . . .[153]

"The genius of modern tort law is its emphasis on injury,"[154] and "[t]he rule of

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147. *Id.* at 350.

148. 409 N.E.2d 661, 685-86 (Ind. Ct. App. 1980).

149. *Id.* at 686 ("We similarly believe the facts of the instant case do not require us to decide this disputed question. Rather, our review of the record discloses that even assuming the 'presumed' damages prohibition of *Gertz* is applicable to the instant case, there is ample evidence of actual injury and recklessness to meet an appropriate constitutional standard.").

150. *See, e.g.*, Kelley v. Tanoos, 865 N.E.2d 593, 597 (Ind. 2007).

151. VerSteeg, *supra* note 120, at 682.

152. Online Video: *Kelley v. Tanoos*, Indiana Supreme Court Oral Argument (Sept. 6, 2006), http://realvideo.ind.net:8080/ramgen/real/SupremeCourt/09062006_0215pm.rm.

153. Prosser, *supra* note 2, at 851 (citing Liebel v. Montgomery Ward & Co., 62 P.2d 667 (Mont. 1936)).

154. David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 747 (1984).

presumed damages is directly contrary to modern tort law."[155] In other fault-based torts, damages are an essential element of the action. If damages cannot be proved, no cause exists.[156] Defamation's rule of presumed damages can be "traced to tort law's roots in criminal law, which concentrated on the defendant's wrongful conduct, rather than on any actual injury [the defendant] caused."[157] Modern tort law shifted its focus from wrongful conduct to injury,[158] but this shift "has largely bypassed [defamation] law."[159] The main justification is the idea that injury to reputation is difficult to prove.[160]

The first Restatement of Torts, published in 1938, permitted presumed damages and explained the rationale as follows: requiring proof of actual reputational harm would be unfair because "the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects thereof in loss to the person defamed."[161] Other sources agree that defamation damages can be hard to prove.[162]

But "the process of quantifying intangible harm when some injury has been demonstrated is a familiar component of the traditional tort system."[163] Determining damages in suits for intentional infliction of emotional distress or loss of consortium is not easy, but the law does not presume damages; it insists that the plaintiff prove damages.[164] Reputational harm is not so much more difficult to prove that it should require presumed damages.[165] "Once the injury is demonstrated, the [judicial] system, however inexactly, can cope with compensation as it does whenever tortious conduct causes harm."[166] "The judicial system's long experience with . . . psychic damage proximately caused by tortious conduct provides a reasoned, principled, and controllable approach to the assessment of these damages."[167]

In fact, assigning damages to proven, but intangible, injuries has been permitted in the defamation world for more than thirty years. In 1974, the

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155. James A. Hemphill, Note, *Libel-Proof Plaintiffs and the Question of Injury*, 71 TEX. L. REV. 401, 414 (1992) (citing Anderson, *supra* note 154, at 747).

156. KEETON ET AL., *supra* note 36, at 165.

157. Hemphill, *supra* note 155, at 414 (citing Anderson, *supra* note 154, at 747).

158. *Id.*

159. *Id.*

160. *See id.*

161. RESTATEMENT (FIRST) OF TORTS § 621 cmt. a (1938). The Restatement (Second) of Torts does not appear to justify presumed damages. Rather, it says that requiring proof of "special harm" in certain types of cases "goes back to the ancient conflict of jurisdiction between the royal and the ecclesiastical courts." RESTATEMENT (SECOND) OF TORTS § 575 cmt. b (1977).

162. Hemphill, *supra* note 155, at 416 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 394 (1974) (White, J., dissenting)).

163. Halpern, *supra* note 9, at 245.

164. Hemphill, *supra* note 155, at 416.

165. *Id.*

166. Halpern, *supra* note 9, at 245.

167. *Id.*

U.S. Supreme Court in *Gertz* permitted recovery for "actual injury" absent proof of actual malice.[168] The Court explained that "there need be no evidence which assigns an actual dollar value to the injury"[169] and declined to define the nature of "actual injury" except to say that it includes "impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering."[170] To say then, that damages are presumed because they are too difficult to prove is disingenuous.

In addition, the presumption of damages in defamation law is illogical because it is irrebuttable. If a plaintiff alleges slander per se, the fact that a defendant *proves* that a plaintiff suffered no damage is inconsequential.[171] A plaintiff can recover substantial damages even if she withdraws her claim of reputational damage and even if the defendant proves that no one believed the defamatory communication, because damages are "conclusively presumed."[172] The presumption of damages, therefore, does more than fill an "evidentiary vacuum,"[173] it allows juries to reward plaintiffs who have suffered no damage at all.

The presumption of damages is also nonsensical in that it applies only in certain cases—those involving libel or slander per se, not slander. "Yet there is no reason to believe that in [slander] cases the difficulty in proving actual damage to reputation is in any degree diminished."[174] The difficulty of proving damages (such as it is) applies in every type of defamation case. The rationale for presuming damages in slander per se and libel cases seems to be that those types of cases are especially egregious. As previously discussed, however, there are few circumstances in which a postcard sent to a single person stating that a woman wore a funny hat is more heinous than the same content in a speech to thousands.[175]

Presumed damages are also immeasurable and uncontrollable. Writing for the majority in *Gertz,* Justice Powell stated, "the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact."[176] Justice Powell also said that states do not have a substantial interest in providing private individuals with "gratuitous awards . . . in excess of any actual injury."[177] In short, "the relation of presumed damages to compensation for

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168. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

169. *Id.* at 350.

170. *Id.*

171. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 697-98 (1986).

172. *Id.* at 698.

173. *Id.*

174. *Id.*

175. *See* Prosser, *supra* note 2, at 851 (citing Liebel v. Montgomery Ward & Co., 62 P.2d 667 (Mont. 1936)).

176. Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974).

177. *Id.*

injury is [simply] too tenuous to support their inclusion in a reasoned and effective scheme for protecting the interest in reputation."[178]

Not only is the leading rationale for presumed damages unconvincing and the result of their application illogical, but presumed damages also offend the Indiana Constitution. Article I, section 12 of the Indiana Constitution states, "All courts shall be open; and every person, for injury done to him in his person, property, or *reputation* shall have remedy by due course of law."[179] Presumed damages give windfalls to some plaintiffs who are defamed in a certain manner (in writing) or about a certain topic (the per se categories), while leaving others (suing for oral statements that do not amount to slander per se) with a huge hurdle to clear—proof of special damages—before plaintiffs may have their remedy. Those plaintiffs who cannot prove loss of business, contracts, employment, or the like are utterly remediless.[180]

Presumed damages offend the First Amendment interest in free speech as well. "Even absent constitutional concerns, the existence of a purportedly compensatory scheme that operates independently of proof of harm would be disturbing. The first amendment implications flowing from such an unbounded assessment process make it intolerable."[181] In *Gertz*, Justice Powell explained, "[t]he largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms."[182] In other words, presumed damages can have a chilling effect on free speech. Where speech is not chilled, the cost of

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178. Halpern, *supra* note 9, at 244.

179. IND. CONST. art. I, § 12 (emphasis added).

180. The common law's disparate treatment of two similar groups of plaintiffs also arguably implicates article I, section 23 of the Indiana Constitution, which prohibits granting privileges or immunities that do "not equally belong to all citizens." IND. CONST. art. I, § 23. It is yet undecided whether section 23, which begins, "The General Assembly shall not," applies to common law, but there are cases applying section 23 to non-statutory actions. *See, e.g.*, Humphreys v. Clinic for Women, Inc., 796 N.E.2d 247 (Ind. 2003) (holding Medicaid regulations and statutes violated section 23); Dvorak v. City of Bloomington, 796 N.E.2d 236 (Ind. 2003) (holding municipal zoning ordinance did not violate section 23); Ind. High Sch. Athletic Ass'n v. Carlberg, 694 N.E.2d 222 (Ind. 1997) (holding non-statutory IHSAA organizational rule did not violate section 23); *In re* Leach, 34 N.E. 641 (Ind. 1893) (holding circuit court's refusal to admit woman to practice law violated section 23).

181. Halpern, *supra* note 9, at 244; *see also Gertz*, 418 U.S. at 349 (Because presumed damages give juries "largely uncontrolled discretion . . . to award damages where there is no loss" and could be used "to punish unpopular opinion," the *Gertz* Court concluded that the presumption would almost always impermissibly restrict the exercise of the First Amendment freedoms.); Melinda J. Branscomb, *Liability and Damages in Libel and Slander Law*, 47 TENN. L. REV. 814, 838 (1980) (quoting *Gertz*, 418 U.S. at 349) (stating compensation for injury without proof of loss is "in derogation of the first amendment principle that state remedies must 'reach no farther than is necessary to protect the legitimate interest involved.'").

182. *Gertz*, 418 U.S. at 349.

presumed damages may be passed on by the communications media to the consumer, inflating the cost of free speech in the press. Should the U.S. Constitution permit a plaintiff to recover for the exercise of free speech that does not result in provable harm? The convolutions of defamation damages are judicial attempts to strike a balance between free speech and reputational interest. But there is a logically cleaner way to strike that balance—the abolition of presumed damages.

Virtually all current reform proposals agree that the solution is to require all plaintiffs to prove injury.[183] A plaintiff should recover for damages he can prove: general damages (injury to reputation), special damages (pecuniary harm), and emotional damages (mental anguish and suffering). If the case involves a small injury, the jury should award nominal damages, which will vindicate the plaintiff's reputation without awarding unproved damages. On the other hand, if the defamation is particularly atrocious (perhaps involving ill will), the jury may consider punitive damages to punish the offensive act and deter similar acts in the future.[184]

It is true that changing the damages landscape in defamation actions will remove a threshold obstacle in slander cases, and more of those cases will reach juries. Whereas the plaintiff in a slander action now must plead and prove special damages to get to trial, under the solution presented, the plaintiff could try the case on allegation and proof of reputational injury, without alleging and proving special harm. But abolishing presumed damages will begin to give juries guidance as to how to compensate plaintiffs.[185] By restricting compensatory damages to those actually proved, the judge will have more control over the size of the verdict, and the parties will be able to value their claims accurately, which facilitates settlement.[186]

Courts can assure a remedy without the anachronistic rigamarole of presumed damages by selecting lower fault standards when the First Amendment does not require actual malice. Using the arguments found in the separate opinions of *Bandido's*, lawyers can advocate the adoption of negligence, and perhaps strict liability, in cases involving private figure plaintiffs suing on matters of private concern. If Indiana courts adopt them, the resulting lower fault standards would give all plaintiffs "remedy by due course of law" for injury to reputation, including vindication by nominal damages at the least, and money damages if proven. And the doctrine of presumed damages, which is irrebuttable, ineffective, and illogical, can be abolished.

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183. Halpern, *supra* note 9, at 245.

184. There are also persuasive arguments for abolishing punitive damages in defamation cases. *See, e.g.*, Anderson, *supra* note 154, at 747.

185. *See id.* at 747-48.

186. *Id.* Professor Anderson also advocates restricting the "actual injury" harm of *Gertz*. *See id.* at 756-58.

CONCLUSION

The real problem in defamation law is the doctrine of presumed harm itself, from which the absurd distinctions and rules that were created to support the doctrine proceed.

> The legitimacy of the libel per quod doctrine was the subject of the famous debate between Dean Prosser and Laurence Eldredge. Eldredge argued that harm was presumed in all libel cases. Prosser argued that harm was presumed only if the publication was libelous on its face or fell into one of the categories of slander per se. Francis Murnaghan's observation about the debate was correct: in the heat of battle, both Prosser and Eldredge failed to see that *the real problem was the presumed harm doctrine itself*, and that the controversy over the role of libel per quod was only a symptom of judicial hostility to the underlying presumption.[187]

Indiana should not adhere to these insupportable rules any longer. The elements of a defamation claim must be clarified. The libel/slander and per se/per quod distinctions should be abandoned. The doctrine of presumed damages should be abolished. In order for these changes to occur, Indiana lawyers must press the arguments and prompt the reform.

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187. *Id.* at 750-51 (emphasis added) (citing Laurence H. Eldredge, *The Spurious Rule of Libel Per Quod*, 79 HARV. L. REV. 733 (1966); Francis D. Murnaghan, *From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions*, 22 CATH. U. L. REV. 1, 7 (1972); William L. Prosser, *More Libel Per Quod*, 79 HARV. L. REV. 1629, 1630 (1966)).

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NOTES

SHOULD YOU LEAVE YOUR LAPTOP AT HOME WHEN TRAVELING ABROAD?: THE FOURTH AMENDMENT AND BORDER SEARCHES OF LAPTOP COMPUTERS

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INTRODUCTION

Technologies permeate every aspect of our lives. From cellular phones and iPods to laptop computers and USB keys, hardly anyone walks down the street without carrying at least one of these items. The various uses of new technologies often impact our legal rights and raise new issues with which courts must grapple.[1] One such issue exists when people travel through our country's airports. Since the tragic events of September 11, 2001, the government has noticeably revamped security at airports. But what are the limits? When does an airport official's conduct cross the line?

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," and that "no Warrants shall issue, but upon probable cause."[2] Thus, searches conducted without a warrant are "per se unreasonable," save a few

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1. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 29 (2001) (deciding whether the use of a thermal-imaging device to detect heat inside of a home constituted a "search" under the Fourth Amendment); *see also* Orin S. Kerr, *Digital Evidence and the New Criminal Procedure*, 105 COLUM. L. REV. 279, 280 (2005) ("Digital evidence should trigger new rules of criminal procedure because computer-related crimes feature new facts that will demand new law.").

2. U.S. CONST. amend. IV.

enumerated exceptions.[3] One such exception applies at our nation's borders.[4] Therefore, under what is known as the "border search exception," a customs official may search travelers and their luggage at the border without a warrant or probable cause.[5] But what about the files saved on a traveler's laptop computer or USB key? Is the laptop computer akin to a suitcase or a purse? Or is it like a body cavity, which may not fall within the border search exception?[6] Numerous courts have addressed this issue[7] but have yet to reach a consensus on how to deal with it. Most recently, in *United States v. Arnold*,[8] a federal district court held that in order for a border search of information contained in a laptop or other similar storage device to be constitutional, it must be sparked by at least reasonable suspicion.[9] Earlier cases seemed to take a different approach, granting airport officials greater latitude in conducting laptop searches at the border.[10]

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3. Katz v. United States, 389 U.S. 347, 357 (1967). Numerous commentators have suggested, however, that the so-called exceptions have practically swallowed the general rule. *See* California v. Acevedo, 500 U.S. 565, 582 (1991) (Scalia, J., concurring) ("[T]he 'warrant requirement' has become so riddled with exceptions . . . it [i]s basically unrecognizable."); Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473 (1985) (noting that the exceptions to the warrant requirement "are neither few nor well-delineated"); *see also* Wayne D. Holly, *The Fourth Amendment Hangs in the Balance: Resurrecting the Warrant Requirement Through Strict Scrutiny*, 13 N.Y.L. SCH. J. HUM. RTS. 531 (1997).

4. United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985).

5. *Id.* at 538. It is to be noted at the outset that this Note will only discuss the constitutionality of laptop searches *at the border*. Border searches include those searches conducted "when entry is made by land from the neighboring countries of Mexico and Canada, at the place where a ship docks in this country after having been to a foreign port, [and] at any airport in the country where international flights land." 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.5(a) (4th ed. 2004) (footnotes omitted). Airport searches fall within a different exception to the warrant requirement. *See generally id.* § 10.6. The standards and rules governing airport searches differ from those controlling the scope of border searches. *See id.* This is due, in part, to the different functions of the two categories of searches. *Compare id.* § 10.6(c) (quoting United States v. Davis, 482 F.2d 893 (9th Cir. 1973)) (stating that airport searches are conducted "to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings"), *with id.* § 10.5(a) (quoting Judith B. Ittig, *The Rites of Passage: Border Searches and the Fourth Amendment*, 40 TENN. L. REV. 329, 331 (1973)) (stating that the purpose of border searches is "to identify citizenship, collect payment on dutiable goods, and prevent the importation of contraband").

6. *See Montoya de Hernandez*, 473 U.S. at 541 n.4 ("[W]e suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body-cavity, or involuntary x-ray searches.").

7. *See, e.g.*, United States v. Romm, 455 F.3d 990 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1024 (2007); United States v. Ickes, 393 F.3d 501 (4th Cir. 2005).

8. 454 F. Supp. 2d 999 (C.D. Cal. 2006).

9. *Id.* at 1007.

10. *See, e.g.*, *Ickes*, 393 F.3d at 505 (affirming a laptop border search that was based on

Most of the searches at issue in the laptop cases have culminated in customs officials finding child pornography saved in the travelers' laptops, often leading to convictions under federal law.[11] However, these rulings have broader implications. "People keep all types of personal information on computers, including diaries, personal letters, medical information, photos and financial records;"[12] thus, if an airport or customs official may search laptop files without reasonable suspicion or probable cause, people may hesitate to store such information on their laptops, or even to carry their laptops onto airplanes when traveling to other countries. Attorneys and businessmen, who may store confidential client information on their laptops, are especially affected by these rulings.[13]

This Note analyzes whether it is constitutional for laptop computers to be searched at the border without any level of suspicion. In Part I, this Note discusses the Fourth Amendment and the border search exception generally. Part II discusses the relevant case law dealing with border searches of laptops and the implications of these rulings. Part III argues that laptop searches at the border should not be considered routine border searches and, thus, should be based on, at the least, reasonable suspicion to be constitutional. Specifically, this section argues that laptop border searches are inconsistent with the traditional rationales that justify the border search exception; that the search of a laptop is more than a "relatively limited intrusion;" and that travelers' strong privacy interests in their laptops outweigh the government's interest in conducting suspicionless laptop border searches. Part IV discusses two important cases in Fourth Amendment jurisprudence involving new laws formulated as a result of the impact of new technologies. Part V addresses the practical implications of the recent rulings allowing airport personnel to conduct suspicionless laptop border searches. This Note concludes that in light of the reliance people have on their laptops and other technologies, a clear rule in this area is needed – a rule that reassures travelers that the files on their laptops will not be searched without, at the least, reasonable suspicion.

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reasonable suspicion, but suggesting that the search was reasonable simply because it took place at the border).

11. *See, e.g.*, *Romm*, 455 F.3d at 993 (concerning a defendant convicted of knowingly receiving and possessing child pornography); *Ickes*, 393 F.3d at 502 (concerning a defendant convicted of transporting child pornography). While not all Fourth Amendment cases deal with pornography, they do usually deal with criminals; as Justice Frankfurter once stated: "It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." United States v. Arnold, 454 F. Supp. 2d 999, 1004 (C.D. Cal. 2006) (quoting *Montoya de Hernandez*, 473 U.S. at 548 (Brennan, J., dissenting)).

12. *Arnold*, 454 F. Supp. 2d at 1003-04.

13. *See* Steve Seidenberg, *9th Circuit: Laptops May Be Subject to Customs Inspections After Overseas Trips*, 5 NO. 37 A.B.A. J. E-REP. 4 (2006) (warning lawyers of the "bind" they may find themselves in).

I. AN ANALYSIS OF THE FOURTH AMENDMENT AND THE BORDER SEARCH EXCEPTION

Understanding the Fourth Amendment generally, as well as the border search doctrine, is necessary when analyzing whether suspicionless laptop border searches are constitutional.[14] The Fourth Amendment, protecting us from "unreasonable searches and seizures," was designed to deter police misconduct and is an important safeguard against intrusions on our privacy and possessory rights.

A. The Fourth Amendment Generally

The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."[15] While the general rule is that searches conducted without a warrant are "per se unreasonable,"[16] there are a number of important exceptions to this warrant requirement.[17] For some of these exceptions, probable cause is required for the search to be constitutional.[18] Other exceptions allow searches to be conducted based upon a standard lower than probable cause, referred to as "reasonable suspicion."[19] Reasonable suspicion is defined as "individualized suspicion . . . less compelling than is needed for the usual law enforcement search."[20] Finally, some searches don't require a warrant, probable cause, or any

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14. Considering that Fourth Amendment law has been referred to as "confusing," Bradley, *supra* note 3, at 1472, "a mass of contradictions and obscurities," *id.* at 1468, and "unstable and unconvincing," *id.* at 1468 (quoting Lloyd L. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49 (1974)), this is no easy task.

15. U.S. CONST. amend. IV.

16. Katz v. United States, 389 U.S. 347, 357 (1967).

17. *See* Bradley, *supra* note 3, at 1473-74 (listing over twenty exceptions to "the probable cause or warrant requirement or both").

18. *See, e.g.*, Carroll v. United States, 267 U.S. 132, 162 (1925) (holding that a warrantless search of a car stopped by police officers who had probable cause to believe the vehicle contained contraband was not unreasonable); *see also* United States v. Ross, 456 U.S. 798, 825 (1982) (extending *Carroll* to "every part of the vehicle and its contents that may conceal the object of the search" as long as probable cause justifies the search of the stopped vehicle in the first place).

19. This standard was first articulated by the Court in *Terry v. Ohio*, 392 U.S. 1, 30 (1968), which held that a "stop" and "frisk" conducted by a police officer was constitutional because it was based on a reasonable suspicion that a "criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous." The reasonable suspicion standard was, later, extended to numerous other contexts. *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709 (1987); New Jersey v. T.L.O., 469 U.S. 325 (1985); *see also* JEROLD H. ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING SUPREME COURT CASES AND INTRODUCTORY TEXT 252 (2006).

20. ISRAEL ET AL., *supra* note 19, at 252.

level of suspicion to be constitutional,[21] but are still governed by the reasonableness standard set forth in the Fourth Amendment.

The seminal case in modern Fourth Amendment jurisprudence is *Katz v. United States*.[22] In *Katz*, the United States Supreme Court rejected the notion that a physical intrusion must occur into a constitutionally protected area for there to be a Fourth Amendment violation.[23] Rather, the Court stated, "[T]he Fourth Amendment protects people, not places,"[24] and found that government officials had violated the Fourth Amendment in the case at hand because they had infringed on the defendant's justified expectation of privacy.[25]

The Court elaborated on this test further when it stated in a later case: "The warrantless search and seizure of [the evidence] would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy [in the evidence] that society accepts as objectively reasonable."[26] This sets forth a two-step test for whether a defendant has an expectation of privacy protected by the Fourth Amendment. First, the court must find that there was a subjective expectation of privacy. Second, the court must decide that the interest is one that society finds to be reasonable; in other words, one to which the court is willing to give Fourth Amendment protection. While this inquiry into the expectation of privacy of the defendant is relevant and important in the case of laptop searches at the border, and one to which we will return, it must be analyzed within the context of the border search doctrine.

B. The Border Search Exception to the Fourth Amendment

The border search is one of numerous administrative and regulatory searches,[27] a wide range of searches that may be conducted without a warrant or probable cause.[28] While some administrative searches require reasonable suspicion to be constitutional,[29] others, including the border search, require no suspicion whatsoever.[30] The idea behind this final category of searches requiring no suspicion is that they are "conducted pursuant to some neutral criteria which

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21. This includes routine border searches, "airport security checks, driver's license check roadblocks, and sobriety checkpoints." *Id.*

22. 389 U.S. 347 (1967).

23. *Id.* at 353.

24. *Id.* at 351.

25. *Id.* at 353.

26. California v. Greenwood, 486 U.S. 35, 39 (1988).

27. *See* LAFAVE, *supra* note 5, § 10.5(a).

28. ISRAEL ET AL., *supra* note 19, at 252.

29. For instance, the Supreme Court upheld the search of a student in a public school based on reasonable suspicion of a violation of school rules in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and the search of a government employee's workplace for work-related reasons based on reasonable suspicion in *O'Connor v. Ortega*, 480 U.S. 709 (1987). ISRAEL ET AL., *supra* note 19, at 252.

30. *See* ISRAEL ET AL., *supra* note 19, at 252; LAFAVE, *supra* note 5, § 10.5(a).

guard[s] against arbitrary selection of those subjected to such procedures."[31] In the case of border searches, the neutral criterion is that one has "entered into our country from outside."[32] Border searches "may in certain circumstances take place not only at the border itself, but at its functional equivalents as well."[33] Numerous lower courts have held that border searches may also be conducted as travelers exit our country.[34]

The border search exception dates back to the First Congress, which passed a customs statute exempting border searches from probable cause and warrant requirements.[35] Later, the United States Supreme Court elaborated on the border search exception as follows: "Since the founding of our Republic, Congress has granted the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."[36]

1. Camara v. Municipal Court of San Francisco.—In *Camara v. Municipal Court of San Francisco*,[37] the United States Supreme Court upheld another "administrative search, the health and safety inspection of buildings."[38] The Court's reasoning in *Camara* "is equally applicable to the routine border search."[39] In *Camara*, the Court stated: "[T]here can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails."[40] The Court went on to state that there are "a number of persuasive factors" that "combine to support the reasonableness of area code-enforcement inspections."[41] The Court listed the factors as follows:

> First, such programs have a long history of judicial and public acceptance. . . . Second, the public interest demands that all dangerous

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31. ISRAEL ET AL., *supra* note 19, at 252.

32. United States v. Ramsey, 431 U.S. 606, 619 (1977).

33. Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) (holding that a roving patrol search of a car twenty miles from the U.S.-Mexico border was *not* a border search). The Court listed "searches at an established station near the border, at a point marking the confluence of two or more roads that extend from the border . . . [, or] a search of the passengers and cargo of an airplane arriving at a St. Louis airport after a nonstop flight from Mexico City" as examples of searches taking place at the functional equivalent of the border. *Id.* at 273.

34. LAFAVE, *supra* note 5, § 10.5(a) n.10 (listing cases that have held such); *see, e.g.*, United States v. Stanley, 545 F.2d 661, 667 (9th Cir. 1976) (listing numerous features in-coming and out-going border crossing searches have in common).

35. LAFAVE, *supra* note 5, § 10.5(a) (citing Act of July 31, 1789, ch. 5, 1 Stat. 29).

36. United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (citing *Ramsey*, 431 U.S. at 616-17 (citing Act of July 31, 1789, ch. 5, 1 Stat. 29)).

37. 387 U.S. 523 (1967).

38. LAFAVE, *supra* note 5, § 10.5(a).

39. *Id.*

40. *Camara*, 387 U.S. at 536-37.

41. *Id.* at 537.

> conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. . . . Finally, because the inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.[42]

These three factors explain why, in the Court's view, health and safety inspections of buildings were reasonable and did not require a warrant or any level of suspicion. Professor LaFave explains how this reasoning applies to the routine border search.[43] First, the border search "has a long history of judicial and public acceptance," similar to the health inspection of buildings, as demonstrated by the fact that border "searches were first authorized by the same Congress which proposed the Bill of Rights."[44] Second, there is "a strong public interest in effective preventive measures," specifically "to identify citizenship, collect payment on dutiable goods, and prevent the importation of contraband . . . [all of which] would be almost completely frustrated by the confines of a search warrant predicated on a showing of probable cause."[45] As to the last factor, while the routine border search is not as impersonal as the health or safety inspection of a building, it is "a relatively limited invasion"[46] because travelers crossing the border are on notice that the search may take place, and there is no stigma attached to the search.[47]

The foregoing discussion only applies to routine customs searches and inspections. In other words, it is only when a search is a "relatively limited invasion" that the *Camara* balancing test justifies a border search merely on the basis that a person has crossed the border.[48] If the invasion is more intrusive, "there is a need to strike the balance anew."[49]

2. United States v. Montoya de Hernandez.—In *United States v. Montoya de Hernandez*,[50] the United States Supreme Court addressed the question of "what level of suspicion would justify a seizure of an incoming traveler for purposes other than a routine border search."[51] The defendant in *Montoya de Hernandez* was suspected of smuggling drugs across the border by hiding them

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42. *Id.* (citation omitted).

43. *See* LAFAVE, *supra* note 5, § 10.5(a).

44. *Id.*

45. *Id.* (quoting Ittig, *supra* note 5, at 331).

46. *Camara*, 387 U.S. at 537.

47. LAFAVE, *supra* note 5, § 10.5(a).

48. *Id.*

49. *Id.* Professor LaFave explains that this is "illustrated by the established rule that a so-called strip search may be conducted only upon a 'real suspicion, directed specifically to that person.'" *Id.* (quoting Henderson v. United States, 390 F.2d 805 (9th Cir. 1967), but noting that other courts use a "reasonable suspicion" standard instead of the "real suspicion" standard).

50. 473 U.S. 531 (1985).

51. *Id.* at 540.

in her alimentary canal.[52] She was detained by U.S. Customs at the Los Angeles airport for an extended period of time.[53] The next day, a warrant was obtained, authorizing a rectal exam and x-ray, which revealed that the defendant had a balloon of an illegal substance hidden in her alimentary canal.[54] She passed six more balloons that day and eighty-eight balloons, containing a total of 528 grams of cocaine, over the next several days.[55]

The Supreme Court affirmed the conviction and held that detaining a "traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, *reasonably suspect* that the traveler is smuggling contraband in her alimentary canal."[56] Thus, the Court made it clear that the extended detention of the traveler was indeed a non-routine search, and held that such non-routine searches would need to be supported by reasonable suspicion to be constitutional.[57]

The Court in *Montoya de Hernandez* emphasized, in a footnote, what it did not hold—"we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body-cavity, or involuntary x-ray searches."[58] By this statement, the Court provided three examples of non-routine searches—strip searches, body cavity searches, and involuntary x-ray searches. All of these searches are more intrusive than a routine border search. Further, the Court left open the question of whether reasonable suspicion would be sufficient to justify such a search, or whether a higher standard would be required.[59]

3. United States v. Flores-Montano.—In a recent case, the United States Supreme Court used language indicating it still retained the distinction between routine and non-routine searches. In *United States v. Flores-Montano*,[60] the Supreme Court held that "the Government's authority to conduct suspicionless inspections at the border includes the authority to remove, disassemble, and reassemble a vehicle's fuel tank."[61] The Court reversed the Ninth Circuit on this issue.[62] The Ninth Circuit had based its ruling on one of its earlier cases, in which it had held that in "'a search that goes beyond the routine, an inspector must have reasonable suspicion,' and the 'critical factor' in determining whether

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52. *Id.* at 534.

53. *Id.* at 533-35.

54. *Id.* at 535.

55. *Id.* at 536.

56. *Id.* at 541 (emphasis added).

57. *See id.*

58. *Id.* at 541 n.4.

59. Lower federal and state courts have held, however, that for strip searches to be constitutional, they must be based on "reasonable suspicion." PHILLIP A. HUBBART, MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK 288 (2005) (citing LAFAVE, *supra* note 5, § 10.5(c)).

60. 541 U.S. 149 (2004).

61. *Id.* at 155.

62. *Id.* at 156.

a search is 'routine' is the 'degree of intrusiveness.'"[63]

The Supreme Court stated: "[T]he reasons that might support a requirement of some level of suspicion in the case of highly intrusive searches of the person—dignity and privacy interests of the person being searched—simply do not carry over to vehicles."[64] Further the Court stated: "Complex balancing tests to determine what is a 'routine' search of a vehicle, as opposed to a more 'intrusive' search of a person, have no place in border searches of vehicles."[65] This is consistent with rulings in other cases that have constantly given us fewer rights in the context of car searches, especially when compared to physical searches or searches of the home.[66]

In *Flores-Montano*, the United States Supreme Court decision resolved only a narrow issue, holding that extensive searches of cars at the border were routine and fell squarely within the border search exception and, thus, did not require any level of suspicion to be constitutional.[67] The Court did not provide explicit guidance on any other kind of search. However, by ruling that the search of a car is routine,[68] the Court implied that it retained the distinction between routine and non-routine searches, as set forth in *Montoya de Hernandez*.[69]

Furthermore, the Court pointed to the interests at stake that may "support a requirement of some level of suspicion"—the "dignity and privacy interests of the person being searched."[70] This analysis may parallel the inquiry set forth in *Katz* that is relevant when determining if a search has taken place. Thus, the question remains—are these interests at stake when a border official searches through the files of a traveler's laptop computer?[71] If this question is answered affirmatively, it may follow that the search of a laptop is non-routine and intrusive, and, therefore, requires at least some level of suspicion to be constitutional.

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63. *Id.* at 152 (citing United States v. Molina-Tarazon, 279 F.3d 709, 712-13 (9th Cir. 2002)).

64. *Id.*

65. *Id.*

66. *See* ISRAEL ET AL., *supra* note 19, at 188.

67. *See Flores-Montano*, 541 U.S. at 155.

68. *See id.* at 153-55.

69. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 541 n.4 (1985) (stating that "we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body-cavity, or involuntary x-ray searches.").

70. *Flores-Montano*, 541 U.S. at 152.

71. This is not the first time new technologies have run the risk of intruding on our right to privacy, as was noted by Justice Scalia in *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001), when he stated that "[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology." *See generally* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801 (2004).

II. COURTS' RESPONSES TO SEARCHES OF LAPTOP COMPUTERS AT THE BORDER

While many courts have grappled with what level of suspicion, if any, is required for a laptop border search to be constitutional, most have found that the search at issue was supported by reasonable suspicion, and, thus, did not discuss or decide whether searches of laptop computers could occur without probable cause or reasonable suspicion, generally speaking. For instance, in *United States v. Irving*,[72] the Second Circuit held that the search of the defendant's computer diskettes and undeveloped film was supported by reasonable suspicion, and, thus, the court did not "determine whether [these searches] were routine or non-routine."[73] While many courts have stopped their analysis after finding reasonable suspicion, a few courts have dealt with the issue of laptop border searches more directly.

A. United States v. Ickes

In *United States v. Ickes*,[74] the Fourth Circuit affirmed a denial of the defendant's motion to suppress evidence found during a border search.[75] Ickes was entering the United States from Canada at a port of entry near Detroit, Michigan.[76] The U.S. Customs inspector was "puzzled" when Ickes told him that he was returning from vacation because his "van appeared to contain 'everything he owned.'"[77] After finding marijuana and photographs of young boys in the van, agents placed Ickes under arrest and continued searching the van—they seized a computer and seventy-five disks, which contained additional child pornography.[78]

Ickes urged the court to recognize a First Amendment exception to the border search doctrine, which is, itself, an exception to the Fourth Amendment.[79] He claimed that the border search exception did not apply to "expressive material,"

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72. 452 F.3d 110 (2d Cir. 2006).

73. *Id.* at 124. The lower court in *United States v. Irving*, 2003 U.S. Dist. LEXIS 16111, at *15 (S.D.N.Y. Sept. 15, 2003), had stated in dicta that the search of the diskettes and undeveloped film may have been constitutional even without reasonable suspicion. *See also* Jared Spitalnick, Comment, United States v. Irving *(decided September 15, 2003)*, 49 N.Y.L. SCH. L. REV. 425, 425 (2004) (arguing that this "dicta could provide the basis for a troubling expansion of the border-search doctrine").

74. 393 F.3d 501 (4th Cir. 2005).

75. *Id.* at 502.

76. *Id.*

77. *Id.*

78. *Id.* at 503.

79. *Id.* at 505-06. Ickes also claimed that the search of his computer and disk did not fall within the statutory language of 19 U.S.C. § 1581(a) (2000), through which Congress has authorized border searches. *Ickes*, 393 F.3d at 504. However, due to the sweeping language of the statute and the history of the government's power to conduct routine searches at the border, the court dismissed this argument quickly. *Id.* at 503-05.

and that the court's ruling was sweeping and could lead to the search of every laptop on any international flight.[80] Ickes did not argue that the laptop search was too invasive of his privacy rights, thus constituting a violation of the Fourth Amendment itself.

The court refused to create a First Amendment exception to the border search doctrine.[81] In so doing, the court's language seemed to extend even beyond rejecting the First Amendment exception argument. The court emphasized the government's strong "overriding interest in securing the safety of its citizens" as it applies to border searches generally.[82] The court said that this interest must be balanced against "a lesser interest on the side of the potential entrant," whose "expectation of privacy [while not at his or her home] is substantially lessened."[83] The court also expressed its concern with the implementation of a First Amendment exception, stating that this "would ensure significant headaches for those forced to determine its scope . . . . These sorts of legal wrangles at the border are exactly what the Supreme Court wished to avoid by sanctioning expansive border searches."[84]

The defendant in this case was unsympathetic to be sure. However, the court's ruling was broader than necessary. The court could have denied the defendant's motion solely on the basis of the finding that the search of the computer and disks was based on a reasonable suspicion, and, thus, constitutional. Albums of nude boys in the van had already been found.

In rejecting Ickes' argument that the court's ruling was overly sweeping, the court stated, "*[a]s a practical matter*, computer searches are most likely to occur where—as here—the traveler's conduct or the presence of other items in his possession suggest the need to search further"; in other words, when there is reasonable suspicion.[85] By so stating, the court implied that it identifies border searches solely as a matter of practicality and is not willing to extend legal protection to travelers, *requiring* reasonable suspicion for these searches. The court did not address whether laptop computer searches are routine or not, but by implication, the court seemed to assume that they are routine.

The court in *Ickes* also characterized the traveler's interest very narrowly: "Since 'a port of entry is not a traveler's home,' his expectation of privacy there is substantially lessened."[86] This reasoning begs the question of what the traveler's expectation of privacy really is under the circumstances. The court focused on the traveler's expectation of privacy at the border generally, while it should have focused, instead, on the privacy interest at stake here—the expectation of privacy in the computer and disks specifically.

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80. *Ickes*, 393 F.3d at 506-07.

81. *Id.* at 507.

82. *Id.* at 506.

83. *Id.*

84. *Id.*

85. *Id.* at 507 (emphasis added).

86. *Id.* at 506 (quoting United States v. Thirty-Seven Photographs, 402 U.S. 363, 376 (1971)).

While the court's language in *Ickes* was very broad, the bottom line of the court's reasoning was fairly narrow; the court rejected the defendant's arguments that the search at hand was unconstitutional and affirmed the conviction. The defendant's main argument was that the court should carve out a First Amendment exception to the border search doctrine.[87] It is the defendant's argument that was a large part of the problem, leading to the sweeping dicta. For one, the exception argued for was very broad. Indeed, part of the reason the court rejected it is because it would "create a sanctuary at the border for all expressive material—even for terrorist plans."[88] Secondly, the Supreme Court in an earlier case had rejected a First Amendment exception for warrant applications, thus the Fourth Circuit in *Ickes* stated: "Given the Court's reluctance to create a First Amendment exception to the general principles governing warrant applications, we find it unlikely that it would favor a similar exception to the border search doctrine."[89]

A different argument, one based on the Fourth Amendment and the strong privacy interests of the traveler, may have been more successful. Further, any rule formulated in this area of the law must take into account the nation's countervailing security interests, and thus should allow for laptop searches if there is reason to believe the person is a threat to our nation's security. Perhaps this is why the court rejected the First Amendment argument so strongly.

B. United States v. Romm

In the summer of 2006, the Ninth Circuit decided a laptop border search case that garnered much attention.[90] In *United States v. Romm*,[91] the court denied a motion to suppress images of child pornography and affirmed the defendant's convictions.[92] The defendant, Romm, had flown from Las Vegas, where he was attending a training seminar, to Kelowna, British Columbia.[93] Canada's Border Services Agency stopped Romm for questioning after discovering that Romm had a criminal history.[94] An agent examined Romm's laptop and saw several child pornography websites in the laptop's "internet history."[95] Upon further questioning, Romm admitted that this was in violation of the terms of his

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87. *Id.*

88. *Id.*

89. *Id.* at 507.

90. *See, e.g.*, Seidenberg, *supra* note 13; Declan McCullagh, *Police Blotter: Laptop Border Searches OK'd*, CNET NEWS.COM, July 26, 2006, http://news.com.com/2100-1030_3-6098939.html; NewsTarget, *Homeland Security Can Now Search Your Laptop Computer: Man Gets 25 Years for Deleted Image Files*, NEWSTARGET.COM, July 27, 2006, http://www.newstarget.com/019790.html.

91. 455 F.3d 990 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1024 (2007).

92. *Id.* at 1006.

93. *Id.* at 994.

94. *Id.*

95. *Id.*

probation.[96] Canada's immigration service decided not to allow Romm entrance into the country, and Romm took the next flight out to Seattle.[97] At the Seattle-Tacoma airport, Romm was interviewed by U.S. Customs officials, who informed him that they needed to search his laptop.[98] Romm agreed, and a forensic analysis of the hard drive was performed.[99] The analysis revealed ten pictures of child pornography, all of which had been deleted.[100]

"Romm was convicted of knowingly receiving and knowingly possessing child pornography in violation of" federal law and received "concurrent mandatory minimum sentences of ten and fifteen years."[101] Romm appealed the conviction, setting forth numerous arguments. He argued, most importantly, that the search of the laptop intruded on his First Amendment rights and was, therefore, not a routine border search.[102] The court declined to consider this issue because it was not raised by the defense in its opening brief and was, thus, "deemed waived."[103] The Court noted the *Irving* and *Ickes* cases, as well as the Supreme Court case of *Flores-Montano*, in a footnote and stated that they were not deciding "whether the search of Romm's laptop was 'non-routine,' and if so, whether it was supported by reasonable suspicion."[104] Apparently, the defense did not make a Fourth Amendment argument. Thus, these issues were left open for future cases to decide.

C. United States v. Arnold

In *United States v. Arnold*,[105] the United States District Court for the Central District of California decided one of the issues that went unaddressed by the Ninth Circuit in *Romm*. The court granted a motion to suppress evidence found during a border search of the defendant's laptop, CDs, and memory stick.[106] The defendant, Arnold, had arrived at Los Angeles International Airport after a long flight from the Philippines.[107] Arnold was selected for secondary questioning by

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96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 994-95.
101. *Id.* at 993.
102. *Id.* at 997. Romm set forth several other arguments with regards to the border search exception, arguments that were specific to the facts of his case. For instance, Romm argued that he had "never *legally* crossed the U.S.-Canada border," and thus could not be subjected to a border search. *Id.* at 996. The court stated that there was no support for this proposition, and that the issue was whether the traveler "*physically* crossed the border." *Id.*
103. *Id.* at 997.
104. *Id.* at 997 n.11.
105. 454 F. Supp. 2d 999 (C.D. Cal. 2006).
106. *Id.* at 1001.
107. *Id.*

a customs officer.[108] The officer turned Arnold's laptop on to see if it was working, and after the computer booted up, two officers viewed the pictures saved in two Kodak files.[109] After finding a picture of two nude women, one of the officers called in special agents, who found child pornography saved on the laptop.[110]

The court noted that "the oft-quoted phrase 'searches made at the border . . . are reasonable simply by virtue of the fact that they occur at the border' belies the fact that highly intrusive searches are not reasonable merely because they take place at the border."[111] The court held that a search of a computer's hard drive or other electronic storage devices implicates the privacy and dignity interests of a person.[112] The court stated that the search of the contents of a laptop or electronic storage device was more intrusive than the search of "a lunchbox or other tangible object."[113]

While the court realized that a laptop search is not physically intrusive, it stated that it "can be just as much, if not more, of an intrusion into the dignity and privacy interests of a person. This is because electronic storage devices function as an extension of our own memory."[114] The court held that since these interests were implicated, a laptop search is a non-routine search, requiring reasonable suspicion and limited scope.[115] Because the court found that the search in this case was not supported by reasonable suspicion, the motion to suppress the evidence was granted.[116]

This case is the first to recognize that laptop searches implicate privacy and dignity interests. Further, it is the first to clearly hold that a laptop border search is "non-routine." This case has since been appealed to the Ninth Circuit.[117]

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108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* at 1002 (quoting United States v. Flores-Montano, 541 U.S. 149, 152-53 (2004)).

112. *Id.* at 1003.

113. *Id.*

114. *Id.* at 1000.

115. *Id.* at 1002-04.

116. *Id.* at 1007.

117. As Professor Orin Kerr stated: "The interesting question is whether the Ninth Circuit will agree," and "[i]f the Ninth Circuit does agree with Judge Pregerson that computer searches are 'non routine,' there's a decent chance that this case would be the first computer search and seizure case to get to the Supreme Court." Posting of Orin Kerr to The Volokh Conspiracy, http://volokh.com/posts/1160582029.shtml (Oct. 11, 2006, 11:53 EST); *see also* Matt Krasnowski, *LAX Laptop Search Heads for Appeal on Privacy Issue*, DAILYBREEZE.COM, Nov. 11, 2006, http://www.dailybreeze.com/news/articles/4618646.html?page=1&c=y (quoting Shaun Martin, a professor at the University of San Diego School of Law, to have said: "There's no doubt in my mind that the Supreme Court will review one of these cases . . . . The issue is too important and it happens too often to let the results vary depending on what border you happen to cross or what circuit you're in.").

III. THE SEARCH OF A LAPTOP COMPUTER AT THE BORDER IS NOT A ROUTINE BORDER SEARCH

A. The Search of a Laptop Computer at the Border Is Inconsistent with the Rationale Behind the Border Search Exception

Anytime the Court establishes a new exception to the warrant and probable cause requirements, it delineates the reasons it is doing so. Often there are important policy reasons supporting the category of warrantless searches at hand.[118] Sometimes the Court finds that the policies supporting the warrant requirement are not implicated in the category of searches at issue, and, thus, does away with the warrant requirement for those searches.[119] With regards to border searches, the Court has justified it as follows: "Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in."[120] Put another way, the Court has stated that Congress has given "the Executive plenary authority to conduct routine searches and seizures at the border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent the introduction of contraband into this country."[121] This is based in part on "Congress['s] broad . . . powers 'to regulate Commerce with foreign Nations.' Historically such broad powers have been necessary to prevent smuggling and to prevent prohibited articles from entry."[122]

Because all of the reasons justifying the border search doctrine are usually framed in terms of "who and what may enter the country,"[123] these justifications do not apply to suspicionless laptop border searches. The information saved on a laptop can be transported into our country electronically, regardless of whether the traveler or the laptop crosses the border. For instance, in *Romm*, the defendant had accessed the photos from child pornography websites.[124] These

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118. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 24 (1968) (upholding a "stop" and "frisk" based on reasonable suspicion because "we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest").

119. *See, e.g.*, Colorado v. Bertine, 479 U.S. 367, 371 (1987) (quoting South Dakota v. Opperman, 428 U.S. 364, 370 n.5 (1976)) (upholding the constitutionality of warrantless inventory searches because "[t]he policies behind the warrant requirement are not implicated in an inventory search, nor is the related concept of probable cause: 'The standard of probable cause is peculiarly related to criminal investigations, not routine, noncriminal procedures.'" (citation omitted)).

120. Carroll v. United States, 267 U.S. 132, 154 (1925).

121. United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985).

122. *Id.* at 537-38 (citing United States v. Ramsey, 431 U.S. 606, 618-19 (1977)) (citation omitted).

123. *Ramsey*, 431 U.S. at 620.

124. United States v. Romm, 455 F.3d 990, 994 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1024 (2007).

websites could have been accessed anywhere in the world. Even if the defendant had not downloaded the photos onto his laptop and transported them into this country, others living in our country could have accessed the same websites and downloaded the photos without even coming close to our international border. In other words, the presence of the pornography on the laptop was incidental to the border crossing.

Further, law enforcement efforts would not be frustrated by requiring reasonable suspicion as they would be in other contexts; officers could have caught Romm with the pornography inside the country, even if he had crossed the border without being detected. This is in direct contrast with a drug dealer, who is likely to sell the drugs for cash upon crossing the border, never to be caught or prosecuted for his crimes.[125]

While catching people who violate pornography laws is an important government interest, general crime or terrorism prevention is not the justification behind the border search exception. In *Colorado v. Bertine*,[126] the Court upheld the constitutionality of inventory searches because they are conducted for non-criminal purposes.[127] The Court emphasized that if a search is done "*solely* for the purpose of investigating criminal conduct," its validity is "dependent on the application of the probable-cause and warrant requirements of the Fourth Amendment."[128] Thus, intrusive border searches may not be conducted solely for the purpose of catching criminals or terrorists; rather, they must be consistent with the traditional rationales justifying the border search—the prevention of the entry of illegal aliens and contraband into our country.

In *Terry v. Ohio*, the Court upheld the constitutionality of a "stop" and "frisk" based merely on reasonable suspicion because of the strong interest in protecting police and other third parties.[129] The Court made it clear, however, that the scope of the search must be consistent with the justifications supporting the exception in the first place: "The sole justification of the search . . . is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer."[130]

Likewise, the scope of a routine border search must be consistent with the justification for the border search. The scope of the intrusion must be "reasonably designed" to prevent entry of illegal aliens and contraband. Thus, for the purpose of preventing entry of illegal aliens, U.S. Customs officials can check a traveler's passport and Customs Border Patrol declaration, and address any issues arising from these documents.[131] Consistent with the rationale of

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125. Comment, *Intrusive Border Searches—Is Judicial Control Desirable?*, 115 U. PA. L. REV. 276, 283-84 (1966).

126. 479 U.S. 367 (1987).

127. *Id.* at 371.

128. *Id.* (emphasis added).

129. 392 U.S. 1, 29 (1968).

130. *Id.*

131. U.S. CUSTOMS AND BORDER PROTECTION, A LOOK AT THE CBP TRAVELER INSPECTION

preventing entry of contraband, officials may x-ray and search a traveler's car, luggage, and any goods he or she may have.[132] They may also conduct a personal search, which includes a search of the outer clothing, purse, wallet, or pockets.[133] A traveler may be asked to take a laptop computer out of carry-on bags and let it pass through scanners so that border officials may "get an unimpeded look at each computer . . . help[ing] them discern whether it contains hidden explosives" or other illegal substances.[134] To ensure that a laptop is not hiding a weapon or contraband, the laptop may also be opened by officials.[135] Finally, laptop officials may turn the laptop computer on to ensure that it is functioning normally.[136] All of these examinations of a laptop are quick, relatively limited intrusions, and, most importantly, consistent with the rationale of the border search doctrine—preventing the entry of illegal aliens and goods. However, clicking on the various icons of the laptop computer to view photos and read various documents falls outside the scope of this rationale. Suspicionless laptop border searches are not necessary for our government to prevent the entry of illegal aliens and contraband. Child pornography or other illegal photos will still enter into our country, regardless of these suspicionless searches, due to the nature of the Internet and electronic communications.

In *Ickes*, the Fourth Circuit recognized that "[t]he border search doctrine is justified by the 'longstanding right of the sovereign to protect itself,'" but went on to say: "Particularly in today's world, [where] national security interests may require uncovering terrorist communications . . . ."[137] While the government has a strong interest in uncovering terrorist communications, this should not be enough to justify suspicionless laptop border searches of all travelers. Rather, by requiring reasonable suspicion, a standard lower than probable cause, the courts will allow the government to continue with its important job of investigating potential terrorists, while, still, protecting travelers' privacy interests.

PROCESS (2006), http://www.customs.ustreas.gov/linkhandler/cgov/toolbox/publications/travel/whyexamc.ctt/whyexamc.pdf.

132. LAFAVE, *supra* note 5, § 10.5(a).

133. *Id.*

134. Daniel Engber, *What Makes Laptops So Dangerous?: Why They Get Special Attention at the Airport*, SLATE, Nov. 22, 2005, http://www.slate.com/id/2130910/. As a result of this common practice of asking travelers to remove their laptops from carry-on bags, many travelers have been forgetting or losing their laptops at airports. *See, e.g.*, Chris Woodyard, *Fliers Lose Laptops at Airport Checkpoints*, USA TODAY, Feb. 19, 2002, at 1A, *available at* http://www.usatoday.com/money/biztravel/2002-02-20-lost-laptops.htm. As the Author of this Note recently witnessed while traveling through Denver International Airport, this has prompted the posting of "Got laptop?" signs, which appear shortly after proceeding through security checkpoints, in at least one airport. *See also id.*

135. Engber, *supra* note 134.

136. *Id.*

137. United States v. Ickes, 393 F.3d 501, 506 (4th Cir. 2005) (citing United States v. Flores-Montano, 541 U.S. 149, 152 (2004) (quoting United States v. Ramsey, 431 U.S. 606, 616 (1977))).

As a general matter, it is important for courts to take into account changed circumstances when formulating new laws or dealing with new cases. In a post-September 11 world, we have increased national security interests. The Supreme Court took into account changed circumstances and current events in *Montoya de Hernandez*, when it recognized that there was a "national crisis in law enforcement caused by smuggling of illicit narcotics," and that smugglers were increasingly using deceptive practices, including the "utilization of alimentary canal smuggling."[138]

What distinguishes the consideration of current events in *Montoya de Hernandez* from the use of recent events in *Ickes*, however, is that in *Montoya de Hernandez*, the "crisis," namely the increase in smuggling of drugs, was consistent with the traditional rationale for the border search doctrine—preventing the entry of contraband into this country.[139] In *Ickes*, however, the language was more sweeping than any of the traditional rationales for the border search doctrine, since "uncovering terrorist communications" may involve more than the usual routine border search.

B. The Search of a Laptop Computer at the Border Is More than "a Relatively Limited Invasion"

The search of a laptop at the border is more than "a relatively limited invasion." As noted, it is only when a search is a "relatively limited invasion" that the *Camara* balancing test justifies a border search merely on the basis that a person has crossed the border.[140] If the invasion is "more intrusive, there is a need to strike the balance [between the need to search and the invasion which the search entails] anew."[141] More intrusive searches are not considered to be routine searches and require some level of suspicion to be constitutional.[142]

1. The Search of a Laptop at the Border Implicates Travelers' Strong Privacy Interests.—In *Flores-Montano*, the Court pointed to the interests that may "support a requirement of some level of suspicion"—the "dignity and privacy interests of the person being searched."[143] Most courts have taken these interests into account as they have considered the question of what constitutes a non-routine search in other contexts. All of these courts, however, have focused on physical intrusion.[144] This may be because those cases consistently arose in

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138. United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) (citation omitted).

139. *Id.* at 537-38.

140. LAFAVE, *supra* note 5, § 10.5(a).

141. *Id.* § 10.5(c).

142. *See id.* (discussing the level of suspicion, at least reasonable suspicion, required for strip searches to be constitutional).

143. United States v. Flores-Montano, 541 U.S. 149, 152 (2004).

144. *See, e.g.*, United States v. Braks, 842 F.2d 509, 512 (1st Cir. 1988) (setting forth six factors to be considered when determining the degree of invasiveness of a search: "(i) whether the search results in the exposure of intimate body parts or requires the suspect to disrobe; (ii) whether physical contact between Customs officials and the suspect occurs during the search; (iii) whether

the context of intrusive physical searches. Thus, the approaches taken in those cases cannot readily be applied to the laptop search cases at hand.

While *Arnold* was the first case to find a traveler's privacy interests implicated in a laptop search, this may be because the trend of carrying laptops while traveling has only recently become widespread. Indeed, *Arnold* was one of the first few cases to have dealt with this issue at all. Nonetheless, taking into account the various uses of the laptop computer, as well as the strong reliance many travelers have come to have on their laptops, one can reach the same conclusion. In an article expressing concern over the recent laptop border search cases and the idea that government officials could search her laptop without any suspicion or a warrant, one legal commentator stated:

> My laptop computer was purchased by Stanford, but my whole life is stored on it. I have e-mail dating back several years, my address book with the names of everyone I know, notes and musings for various work and personal projects, financial records, passwords to my blog, my web mail, project and information management data for various organizations I belong to, photos of my niece and nephew and my pets.
>
> In short, my computer is my most private possession. I have other things that are more dear, but no one item could tell you more about me than this machine.[145]

This commentator lists some of the things one may have stored on his or her laptop—family pictures, financial records, and passwords to email are just a few examples. This illustrates how private computers can be. Furthermore, she emphasizes that "no one item could tell you more about me than this machine."[146] Indeed, a laptop search could reveal just as much private information about a person as a strip search or other intrusive body search can, albeit of a different kind.

Before the advent of the laptop computer, it is unlikely that one would travel carrying all of his or her intimate letters, confidential financial information, and all of his or her family albums. However, the laptop has changed the way people do things. Since this information can easily be stored electronically, people have replaced paper versions of records with electronic ones, and store them on their laptops and take them along for convenience purposes. Thus, while papers are sometimes searched during a routine border search,[147] a laptop search is very different. One can easily control which papers he or she carries in a purse or pocket, but it is not possible to do the same when it comes to a laptop, which may

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force is used to effect the search; (iv) whether the type of search exposes the suspect to pain or danger; (v) the overall manner in which the search is conducted; and (vi) whether the suspect's reasonable expectations of privacy, if any, are abrogated by the search" (footnotes omitted)).

145. Jennifer Granick, Commentary, *Computer Privacy in Distress*, WIRED, Jan. 17, 2007, http://www.wired.com/politics/law/commentary/circuitcourt/2007/01/72510.

146. *Id.*

147. *See, e.g.*, United States v. Fortna, 796 F.2d 724, 738 (5th Cir. 1986).

contain an immense amount of information.

While routine border searches may be conducted without any level of suspicion, the courts have drawn the line at more intrusive body searches, such as strip searches, requiring a showing of "reasonable" suspicion.[148] Laptop border searches should be on the same side of the line as these intrusive body searches. Laptops may contain private photographs of the traveler and his or her family. Those photographed may have been scantily dressed and posing in a manner that they would not present themselves in public. Thus, the laptop search may be an intrusion into the traveler's privacy and bodily integrity. Further, the search of the hundreds or thousands of files saved on a laptop is time-consuming; thus, a traveler who is pulled over for an extended period of time may feel stigmatized and embarrassed.

The courts have not been ambivalent to how private computers, in general, can be. In numerous other contexts, courts have recognized that people have a reasonable expectation of privacy in their computers and afforded this expectation Fourth Amendment protection.[149] In a recent Ninth Circuit case, *United States v. Ziegler*,[150] the court held that the private employees have a reasonable expectation of privacy in their workplace computers.[151] The court based its holding in part on a previous U.S. Supreme Court case, which held that private employees have a reasonable expectation of privacy in their workplaces, even if the office was shared by several employees.[152] Further, the court stated that the defendant had a reasonable expectation of privacy based on the facts in this case; the defendant did not share his office with his co-workers, and he also kept it locked.[153]

Ziegler demonstrates that the court was willing to recognize that "'for most people, their computers are their most private spaces,'" thus leading to a recognition of a legitimate expectation of privacy in the computer.[154] This reasoning should be given greater weight in the laptop computer situations because laptop computers are more private than workplace computers—workplace computers are unlikely to contain family photographs, personal diaries, or private financial information. Also, a laptop computer is usually not shared by others, and the data is sometimes "locked," or protected by a password or encryption. Similar facts were noted by the court in *Ziegler* as providing further support for the defendant's expectation of privacy.[155] Thus,

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148. *See* HUBBART, *supra* note 59, at 288.

149. *See generally* Robin Cheryl Miller, Annotation, *Validity of Search or Seizure of Computer, Computer Disk, or Computer Peripheral Equipment*, 84 A.L.R.5th 1 (2000).

150. 474 F.3d 1184 (9th Cir. 2007).

151. *Id.* at 1190.

152. *Id.* at 1189 (citing Mancusi v. DeForte, 392 U.S. 364 (1968)).

153. *Id.* at 1190.

154. *Id.* at 1189 (quoting United States v. Gourde, 440 F.3d 1065, 1077 (9th Cir. 2006) (en banc) (Kleinfeld, J., dissenting)).

155. *Id.* at 1190 (noting that the defendant did not share his office with co-workers and kept it locked).

just as private employees have a legitimate expectation of privacy in their workplace computers, travelers have a legitimate expectation of privacy in their laptop computers and should be provided with Fourth Amendment protection—it should be unconstitutional for border officials to search the contents of a laptop without, at the least, reasonable suspicion.

Another point illustrated by *Ziegler* is that cases involving computers and other technologies raise a similar dilemma—the courts must base their holdings on prior precedents, which did not involve technology. In *Ziegler*, the court drew the analogy between an office and the computer in the office.[156] It was not hard to see the similarity between the two contexts because the computer is in the office. It may be harder to find a parallel to laptop computers. One can think of the laptop as a closed container, which, as a general matter, may be searched during a routine border search.[157] By defining a laptop in this manner, however, one would be limiting the scope of the search of a laptop to the scope of the search of a closed container, namely opening it and looking inside for illegal substances. This is the kind of laptop search officials routinely conduct—opening the laptop, making sure it does not have contraband hidden inside, and turning the laptop on to ensure it is working properly.[158] The files saved on a laptop's hard drive, however, differ markedly from the physical contents of a closed container, and thus this analogy seems incomplete.

Another analogy that can be drawn is between intrusive physical searches, which require suspicion, and laptop searches. While the body and laptop computers are very different, a person's laptop computer resembles his or her memory, as noted by the court in *Arnold*:

> While not physically intrusive as in the case of a strip or body cavity search, the search of one's private and valuable personal information stored on a hard drive . . . can be just as much, if not more, of an intrusion into the dignity and privacy interests of a person. *This is because electronic storage devices function as an extension of our own memory.*[159]

It may be necessary for the lower courts to draw this analogy, so that existing precedents will work and apply to the new laptop computer cases. Or the courts may simply recognize that technology has had a great impact on this area of the law, and declare that travelers have a legitimate expectation of privacy in their laptop computers. This would create a consistency between modern technologies, travelers' expectations, and the law in this area.

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156. *See id.*

157. *See, e.g.*, Henderson v. United States, 390 F.2d 805, 808 (9th Cir. 1967) (stating that a "person crossing our border may be required to disclose the contents of his baggage, and of his vehicle" and "[w]e assume that the same rule would apply to the contents of his or her purse, wallet, or pockets").

158. *See supra* notes 134-36 and accompanying text.

159. United States v. Arnold, 454 F. Supp. 2d 999, 1000 (C.D. Cal. 2006) (emphasis added).

2. Travelers' Privacy Interests in Their Laptops Outweigh the Government's Need to Conduct Suspicionless Laptop Searches at the Border.—To determine whether a search is reasonable, a balance must be made between the government's need to conduct the search at hand and the privacy interests at stake.[160] In the case of laptop computer border searches, travelers' privacy interests in their laptops outweigh the government's need to conduct suspicionless laptop searches.

In *United States v. Place*,[161] the Supreme Court held that a detention of a piece of luggage for ninety-minutes had "exceeded the bounds of a permissible investigative detention of the luggage."[162] The defendant in *Place* aroused the suspicions of law enforcement officers as he stood in line at Miami International Airport to buy a ticket to La Guardia Airport in New York.[163] When the defendant arrived in New York, he found two DEA agents waiting for him.[164] After refusing to consent to the search of his luggage, the agents seized his luggage and took it to Kennedy Airport, where a "sniff test" was conducted on the bags and a narcotics detection dog reacted positively to one of the two bags.[165] Ninety minutes had passed since the luggage was first seized.[166]

While the search and seizure at issue in *Place* took place in an airport, they were not conducted as part of an airport or border search. Rather, the Court applied the principles from *Terry v. Ohio*, which allows for a "stop" and "frisk" as long as it is supported by reasonable suspicion.[167] The Court stated, however, that while *Terry* allows for investigative stops based on reasonable suspicion, this does not end the inquiry; "[w]e must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."[168] As a part of this balancing, the Court recognized that there are degrees of intrusiveness, and while "some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests will justify a seizure based only on specific articulable facts that the property contains contraband or evidence of a crime,"[169] in this case, "[t]he length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause."[170] The Court, therefore, held that the detention at issue was unconstitutional.[171]

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160. *See* Camara v. Municipal Court of S.F., 387 U.S. 523, 533-34 (1967).
161. 462 U.S. 696 (1983).
162. *Id.* at 698.
163. *Id.*
164. *Id.*
165. *Id.* at 699.
166. *Id.*
167. *Id.* at 702 (citing Terry v. Ohio, 392 U.S. 1 (1968)).
168. *Id.* at 703.
169. *Id.* at 706.
170. *Id.* at 709.
171. *Id.* at 709-10.

In the case of laptop border searches, strong privacy interests of travelers are implicated. Travelers have an interest in protecting personal items saved on their laptops, such as diaries, personal financial information, and passwords, which may be characterized as an "extension of our own memory."[172] Business professionals and attorneys also have an interest in protecting the privacy of client information they have saved on the laptop, which they are under a duty to do.

On the other hand is the government's need to conduct suspicionless searches of laptops—to open any laptop it would like and spend time clicking on the various icons, reading files, and looking at photos. While a border official opening a laptop, ensuring it does not have drugs or weapons, and turning it on may be acting within the scope of the Constitution, as were the police when they initially detained the defendant in *Place*, the extended time and degree of the intrusion should render the laptop border search unconstitutional, as it did in *Place*.

IV. LESSONS FROM *KYLLO* AND *KATZ*: NEW TECHNOLOGIES OFTEN WARRANT NEW RULES

While the constitutionality of laptop border searches is a relatively new issue that the courts must deal with, this is not the first time a new technology has affected Fourth Amendment jurisprudence. In *Kyllo v. United States*,[173] the Supreme Court grappled with the question of whether "a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a 'search' within the meaning of the Fourth Amendment."[174] In *Kyllo*, the scan of the defendant's house with the thermal-imaging device revealed to agents that portions of the house "were relatively hot."[175] The agents concluded that the defendant "was using halide lights to grow marijuana in [the] house."[176] Eventually, a search warrant was issued and over 100 marijuana plants were found.[177] The defendant "was indicted on one count of manufacturing marijuana."[178]

The *Kyllo* Court expressed a concern that new technologies may diminish our privacy: "The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy."[179] The Court held, in an opinion by Justice Scalia, that "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the

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172. United States v. Arnold, 454 F. Supp. 2d 999, 1000 (C.D. Cal. 2006).
173. Kyllo v. United States, 533 U.S. 27 (2001).
174. *Id.* at 29.
175. *Id.* at 30.
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 34.

surveillance is a 'search' and is presumptively unreasonable without a warrant."[180]

In *Katz v. United States*,[181] a much earlier case, the Supreme Court also dealt with a new technology and how it would impact our Fourth Amendment rights. In *Katz*, the Court held that government officials listening in through an electronic listening and recording device fastened to the outside of a telephone booth were in violation of the Fourth Amendment.[182] The Court was, once again, well-aware of the impact technology had on our expectations of privacy. The Court noted:

> One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. *To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.*[183]

The set of circumstances in *Kyllo* and *Katz* were very different from what we have here when confronting the issue of laptop border searches; yet, the concern is the same—will the new technologies and the new set of circumstances that arise as a result of these technologies diminish our right to privacy? In *Kyllo*, the new technology at issue, the thermal-imaging device, was used to actually conduct the surveillance.[184] This differs markedly from what we have in the laptop cases, where those being subjected to the search are the ones utilizing the technology. In *Katz*, the technology, the electronic recording device, was used to eavesdrop on the defendant by government officials, but the defendant himself was also using a technology—the telephone booth.[185] Thus, regardless of how the technology is used, the issue is the same; as Justice Scalia put it: "The question we confront . . . is what limits there are upon this power of technology to shrink the realm of guaranteed privacy."[186]

In both *Kyllo* and *Katz*, the Court recognized the changes technology has made to our lives and formed a rule that protected our right to privacy. The same is necessary here—a rule that recognizes that travelers' expectation of privacy in the contents of their laptops is akin to the privacy interest they have in their bodies and their homes, all of which require some level of suspicion before a search is conducted by government officials.

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180. *Id.* at 40.
181. 389 U.S. 347 (1967).
182. *Id.* at 359.
183. *Id.* at 352 (emphasis added).
184. *Kyllo*, 533 U.S. at 29.
185. *Katz*, 389 U.S. at 348.
186. *Kyllo*, 533 U.S. at 34.

V. PRACTICAL IMPLICATIONS: SHOULD TRAVELERS LEAVE THEIR LAPTOPS AT HOME WHEN TRAVELING ABROAD?

Until a clear rule comes out of these cases, travelers need to realize that the content of their laptops may be searched when crossing our country's border regardless of who they are or how they act. If a traveler does not want to be subjected to such a search, he or she may be better off leaving his or her laptop at home. Attorneys or other professionals who have confidential information on their laptops may have a duty to do so from here on out.[187] Even if the confidential information is not downloaded or saved to the laptop itself, if that information has been recently accessed, the laptop may have created temporary files of the information, which can be recovered through forensic examination.[188] Deleted images or files can also be recovered by forensic analysis.[189]

It is not clear what would happen if the information on the laptop is encrypted or protected by a password,[190] thus, "[p]erhaps the only way to guarantee protection for confidential data is to leave your laptop at home and connect to your data via a computer that stays overseas."[191] This will inevitably result in changes to the way businesses and firms conduct their business.[192]

CONCLUSION

The courts should hold that for a search of the content of a traveler's laptop at the border to be constitutional, it must be based on, at the least, reasonable

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187. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003) ("A lawyer shall not reveal information relating to the representation of a client."); *see also* Seidenberg, *supra* note 13.

188. Seidenberg, *supra* note 13.

189. *See* United States v. Romm, 455 F.3d 990, 995 (9th Cir. 2006), *cert. denied*, 127 S. Ct. 1024 (2007). In *Romm*, even though the defendant had deleted all of the child pornography he had viewed on his laptop, government officials were able to recover these files through forensic analysis. *Id.* Analysis can also reveal when the files or images were "created, accessed, or modified." *Id.*

190. *See* A. Michael Froomkin, *The Metaphor is the Key: Cryptography, the Clipper Chip, and the Constitution*, 143 U. PA. L. REV. 709, 829 (1995) (arguing that "a properly guarded key to a cryptographic system" is an "item of information for which the user would have both a subjectively and objectively reasonable expectation of privacy" and thus should be given Fourth Amendment protection); *but cf.* Orin S. Kerr, *The Fourth Amendment in Cyberspace: Can Encryption Create a "Reasonable Expectation of Privacy?,"* 33 CONN. L. REV. 503, 505 (2001) ("argu[ing] that encryption cannot create Fourth Amendment protection"). It is to be noted that this on-going debate between scholars is not in the context of the border search doctrine.

191. Seidenberg, *supra* note 13.

192. *See* James Gilden, *Laptop Seizure Raises Concerns over Firms' Data: Travel Managers Worry About What Can Happen to Proprietary Information at Customs*, L.A. TIMES, Nov. 4, 2006, at C4 (reporting that "[e]ighty-six percent of members [of the Association of Corporate Travel Executives, an Alexandria, Virginia-based trade group] surveyed said that court decisions allowing government agents to seize computers at the borders were cause to limit the kind of proprietary information typically carried on executives' laptops").

suspicion. This will be consistent with travelers' expectation of privacy, and will not lead to an unwarranted expansion of the border search doctrine.[193] While all of the cases that have arisen so far have involved defendants caught with pornography and prosecuted for their crimes, the courts should take a step back and consider how their rulings will affect us all because the rules "'fashion[ed] [are] for the innocent and guilty alike.'"[194]

The government has a strong interest in protecting the integrity of the border and ensuring that illegal aliens and contraband do not enter our country. However, this interest is not as strong in the case of laptop computer border searches because the material saved on a laptop computer may enter our nation regardless of the laptop or the border crossing. The government also has a very strong interest in preventing terrorism; yet, this must be kept within the confines of a reasonable suspicion standard to protect the majority of travelers, most of whom are innocent of any terrorist activities.

Many travelers have come to rely heavily on their laptops. During the long airplane rides, they may work on their laptops to pass the time. If traveling for business purposes, the laptop may have important documents and files, essential to the conduction of business. Most hotels provide Internet access for their guests, allowing them to use the laptop in the hotel room for work, school, or communicating with loved ones back home. If the courts do not take these changed circumstances into account, travelers may have to choose between their laptop and their expectation of privacy and desire to avoid the embarrassment and hassles of a laptop border search. Justice Brennan, many years ago, in *Montoya de Hernandez*, issued a warning of what may occur if we were to take the safeguards provided to us by our Constitution lightly:

> [I]f there is one enduring lesson in the long struggle to balance individual rights against society's need to defend itself against lawlessness, it is that "[it] is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end."[195]

Many years have passed since Justice Brennan warned against "mak[ing] light of insistence on scrupulous regard for the safeguards of civil liberties,"[196] however, in light of modern technology and current events, we need to take his warning more seriously than ever before.

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193. *See also* Spitalnick, *supra* note 73, at 425.

194. Illinois v. Gates, 462 U.S. 213, 290 (1983) (Brennan, J., dissenting) (quoting Draper v. United States, 358 U.S. 307, 314 (1959) (Douglas, J., dissenting)).

195. United States v. Montoya de Hernandez, 473 U.S. 531, 567 (1985) (Brennan, J., dissenting) (quoting Davis v. United States, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting)).

196. *Id.*

GARCETTI V. CEBALLOS: PUBLIC EMPLOYEES LEFT TO DECIDE "YOUR CONSCIENCE OR YOUR JOB"*

ELIZABETH M. ELLIS**

INTRODUCTION

The Supreme Court recognized that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[1] Memorializing that ideal, the Supreme Court stated that the government

> may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. . . . Such interference with constitutional rights is impermissible.[2]

However, in contrast to this articulated ideal, in *Garcetti v. Ceballos*,[3] the Court permitted interference with the free speech rights of public employees. In *Garcetti*, a sharply divided 5-4 Court held that a public employee's speech made "pursuant" to the speaker's official job duties was afforded no First Amendment protection against an employer's retaliatory actions because such speech is made in the capacity of an *employee* and not in the capacity of a *citizen* for First Amendment purposes.[4] While certain circuit courts of appeals had previously established *Garcetti*-type exclusions for First Amendment protection of public employees' speech relating to their official job duties, before *Garcetti*, the Supreme Court had not categorically excluded such speech from First

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* Press Release, American Federation of State, County and Municipal Employees, Supreme Court to Public Employees: 'Your Conscience or Your Job' (May 30, 2006), http://www.afscme.org/press/6659.cfm (quoting the reaction of Gerald W. McEntee, President of the American Federation of State, County and Municipal Employees, to the United States Supreme Court decision in *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)). McEntee cautioned, "[T]he Supreme Court has sent a chilling warning to potential government whistleblowers that their anxiety about potential retaliation is well-founded. The Court has said to public employees, in effect: 'Your conscience or your job. You can't have both.'" *Id.*

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1. Connick v. Myers, 461 U.S. 138, 145 (1983) (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

2. Perry v. Sindermann, 408 U.S. 593, 597 (1972) (reaffirming that a teacher's public disagreement with superiors on issues of public concern may warrant First Amendment protection from retaliatory action).

3. 126 S. Ct. 1951 (2006).

4. *Id.* at 1960.

Amendment protection.[5] Rather, the Supreme Court required that the speech address a matter of public concern and then weighed the employee's interest in commenting on a matter of public concern against the employer's interest in effectively carrying out its functions.[6] *Garcetti* significantly alters the judicial approach to public employee First Amendment claims. It creates a threshold requirement: Before reaching the established balancing test for potential First Amendment protection, the employee's speech must be made in the capacity of a citizen and not in the capacity of an employee speaking pursuant to the employee's official duties.[7] This threshold test must be met regardless of whether the speech touches on a matter of public concern.

Part I of this Note briefly reviews several key Supreme Court holdings respecting First Amendment protections afforded to public employee speech prior to *Garcetti*. Part II examines the *Garcetti* decision and the likely First Amendment rights of public employees following this decision. Part III explores lower courts' early applications of *Garcetti*, including courts' disparate treatment of employee speech made privately versus publicly, reasoning for broadly or narrowly applying *Garcetti*, and approaches for determining what constitutes an employee's official duties. Part IV addresses policy concerns stemming from *Garcetti*, including the need for continued judicial involvement to resolve the factual disputes involved in defining an employee's official duties, and the detrimental impact on society's access to informed commentary on matters of public concern resulting from this wide-sweeping exclusion of speech from constitutional protection. The Note concludes that courts applying *Garcetti* should narrowly define the scope of an employee's official duties so as to minimize unjustified interference with the constitutional rights of public employees when commenting on matters of public concern.

I. BRIEF OVERVIEW OF FIRST AMENDMENT RIGHTS OF PUBLIC EMPLOYEES PRIOR TO *GARCETTI*

The Court in *Garcetti* presented the issue as "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties."[8] Analysis of constitutional protections afforded to public employees for their speech has routinely commenced with a discussion of the foundational free speech principles set forth by the Court in *Pickering v. Board of Education*.[9] In *Pickering*, a teacher was fired for writing a letter to a local newspaper criticizing the school board's handling of efforts to

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5. *See* Marni M. Zack, Note, *Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights*, 46 B.C. L. REV. 893, 901-03 (2005).

6. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

7. *Garcetti*, 126 S. Ct. at 1960. The Tenth Circuit Court of Appeals characterized this threshold requirement for First Amendment protection as a "heavy barrier erected by the Supreme Court." Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1331 (10th Cir. 2007).

8. *Garcetti*, 126 S. Ct. at 1955.

9. *See* 391 U.S. 563 (1968).

raise new revenues for the school and the board's allocation of financial resources between school programs.[10] The Court held that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[11] The Court additionally reasoned that the "problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[12] After balancing the interests, the Court recognized the "interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[13] Additionally, the Court noted:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.[14]

Thus, the Court recognized that the specialized knowledge and expertise public employees acquire through their employment represent an important contribution to societal discourse, the expression of which should not be subject to employer retaliation.

The Supreme Court further clarified the First Amendment rights of public employees in *Givhan v. Western Line Consolidated School District*,[15] in which the Court ruled that a teacher was not categorically denied First Amendment protection for speech made *privately* containing allegations that school policies and practices were racially discriminatory.[16] The Court held that its previous decisions "do not support the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides

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10. *Id.* at 564-66.

11. *Id.* at 574 (footnote omitted).

12. *Id.* at 568. The Court noted numerous considerations that might affect the outcome of the balancing test, including, but not limited to, whether the statements (1) were directed to any specific person with whom the speaker would normally be in contact during daily performance of employment duties, (2) involved issues respecting maintaining discipline by supervisors or harmony between coworkers, (3) were made by a speaker whose "personal loyalty and confidence" can persuasively be tied to the proper functioning of the employment relationship, (4) interfered with the speaker's performance of daily job duties, and (5) interfered with the operation of the employer. *Id.* at 569-70, 572-73.

13. *Id.* at 573.

14. *Id.* at 572.

15. 439 U.S. 410 (1979).

16. *Id.* at 412-13.

to express his views privately rather than publicly."[17]

In *Connick v. Myers*, the Court reaffirmed *Pickering* by stating that a "public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment,"[18] but acknowledged that the "State's interests as an employer in regulating the speech of its employees 'differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'"[19] At issue in *Connick* was the discharge of an assistant district attorney who, in response to a proposed transfer to a different division, distributed an in-office questionnaire soliciting other employees' views on issues such as office policies and morale, confidence in supervisors, the employee grievance process, and perceived pressure to work on political campaigns.[20]

The *Connick* Court made clear that the *Pickering* balancing test focused on the rights of public employees when commenting on matters of public concern and acknowledged that the functioning of government operations would be impaired if "every employment decision became a constitutional matter."[21] As such, the Court held that First Amendment protections are implicated only when a public employee speaks as a citizen on a matter of public concern and not when an employee speaks on a matter of personal interest.[22] The Court expressed that whether speech addresses a matter of public concern is "determined by the content, form, and context of a given statement, as revealed by the whole record."[23] The Court determined that with the exception of one question on Myers' questionnaire, the content of the questionnaire did not address a matter of public concern; therefore, it was not entitled to First Amendment protection.[24]

Further, the Court addressed the relationship between a public employee's speech and the job responsibilities of that employee in *Rankin v. McPherson*.[25] McPherson was a deputy constable in the county constable's office who performed solely administrative functions.[26] McPherson was terminated after being overheard saying, in response to a failed assassination attempt on the President of the United States, "'if they go for him again, I hope they get him.'"[27] The Supreme Court determined McPherson's speech addressed a matter of public

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17. *Id.* at 414.

18. Connick v. Myers, 461 U.S. 138, 140 (1983).

19. *Id.* (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).

20. *Id.* at 140-41.

21. *Id.* at 143.

22. *Id.* at 147.

23. *Id.* at 147-48.

24. *Id.* at 148 (finding that the questionnaire inquiry regarding whether employees felt pressure to work on political campaigns was a matter of public concern, but ultimately balancing the interests on that sole inquiry in favor of the employer).

25. 483 U.S. 378 (1987).

26. *Id.* at 380-81 (noting that all employees in the constable's office had the job title of deputy constable regardless of their employment responsibilities and duties within the office).

27. *Id.* at 381-82.

concern because McPherson's comment was made in the context of a discussion of the President's policies and the recent assassination attempt.[28] The Court's application of *Pickering* balancing included weighing the administrative functions McPherson was actually required to perform and the interests of the state in the efficient functioning of the governmental office.[29] The balancing in this case demonstrated that the interests involved in preserving First Amendment rights for private speech on a matter of public concern outweighed the government's interest in firing McPherson for such speech.[30]

II. *GARCETTI V. CEBALLOS*

Richard Ceballos was a deputy district attorney for the Los Angeles County District Attorney's office and was contacted by a defense attorney who alleged that an affidavit in a pending criminal matter contained misrepresentations.[31] Ceballos investigated the allegations and determined that the affidavit was inaccurate.[32] He brought the matter to his superiors' attention and prepared a memorandum recommending disposition of the case on the basis of the affidavit inaccuracies.[33] A heated exchange occurred during a meeting with superiors and others about the affidavit allegations, and Ceballos was openly criticized during the meeting.[34] The case proceeded to prosecution despite Ceballos's recommendations, and he was subsequently called by the defense to testify with respect to the affidavit inaccuracies.[35] Ceballos alleged that following his handling of the case, his employers retaliated against him by reassigning him to another position, transferring him to a different courthouse, and denying him a promotion.[36]

Ceballos filed a claim in district court under 42 U.S.C. § 1983, alleging employer retaliation for employee speech in violation of the First and Fourteenth Amendments, and the court granted the defendants' motion for summary judgment.[37] Relying on the *Pickering/Connick* test, the Ninth Circuit Court of Appeals found that Ceballos's memorandum alleging affidavit inaccuracies and

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28. *Id.* at 386.

29. *Id.* at 389-92 (finding persuasive that Rankin's formal job description involved limited actual or potential involvement with law enforcement).

30. *Id.* at 390, 392.

31. Garcetti v. Ceballos, 126 S. Ct. 1951, 1955 (2006).

32. *Id.* Ceballos believed the affidavit mischaracterized a separate roadway as a long driveway, and he doubted the affidavit's accuracy regarding tire tracks on the road because the road's composition prevented tire tracks. *Id.*

33. *Id.* at 1955-56.

34. *Id.* at 1956.

35. *Id.*

36. *Id.*

37. Ceballos v. Garcetti, No. CV0011106AHMAJWX, 2002 WL 34098285, at *2, *4-5 (C.D. Cal. Jan. 30, 2002) (unpublished), *rev'd*, 361 F.3d 1168 (9th Cir. 2004), *rev'd*, 126 S. Ct. 1951 (2006).

government misconduct involved a matter of public concern and was protected by the First Amendment.[38] The court found that public employees' freedom to speak on matters of public concern "is important to the orderly functioning of the democratic process, because public employees, by virtue of their access to information and experience regarding the operations, conduct, and policies of government agencies and officials, 'are positioned uniquely to contribute to the debate on matters of public concern.'"[39] As such, the court forcefully cautioned:

> Not only our own precedent, but sound reason, Supreme Court doctrine, and the weight of authority in other circuits support our rejection of a per se rule that the First Amendment does not protect a public employee simply because he expresses his views in a report to his supervisors or in the performance of his other job-related obligations.[40]

However, the United States Supreme Court reversed the Ninth Circuit, finding the controlling factor to be that Ceballos's memorandum was written pursuant to his official duties as a calendar deputy.[41] The Court established a bright-line rule that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[42] The Court explained that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen."[43] Rather, the restriction "reflects the exercise of employer control over what the employer itself has commissioned or created."[44]

The Court was careful to note two factors that were not dispositive in this case. First, consistent with the precedents set forth in *Givhan* and *Rankin*, the Court stated that it was not controlling that Ceballos's speech occurred privately, rather than publicly, as First Amendment protection may be available in some instances for speech made privately at work.[45] Second, it was also not controlling that Ceballos's memorandum concerned the subject matter of his employment, as First Amendment protection may be available for some speech related to a speaker's job.[46] Rather, the critical factor was that Ceballos wrote the memorandum as part of his official duties as a calendar deputy and was fulfilling

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38. Ceballos v. Garcetti, 361 F.3d 1168, 1180 (9th Cir. 2004), *rev'd*, 126 S. Ct. 1951 (2006).

39. *Id.* at 1175 (quoting Weeks v. Bayer, 246 F.3d 1231, 1235 (9th Cir. 2001)).

40. *Id.* at 1178.

41. *Garcetti*, 126 S. Ct. at 1957, 1960.

42. *Id.* at 1960.

43. *Id.* The Court clarified by stating "[w]hen a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees." *Id.* at 1961.

44. *Id.* at 1960.

45. *Id.* at 1959.

46. *Id.* The Court cited *Pickering* as support for this proposition, noting that the *Pickering* principles apply to numerous other categories of public employees in addition to teachers. *Id.*

the employment functions that he was hired to perform.[47]

The Court acknowledged its prior decisions recognized the value to a democratic society of public employees' commentary on matters of public concern, noting both the interests of the speaker in disseminating the information and the interests of the public in obtaining the information.[48] However, the Court maintained that a public employee, by virtue of entering government service, must be subject to certain restraints on freedoms that are freely enjoyed by non-public employees.[49] Specifically, certain limitations on public employees' First Amendment rights are necessary, according to the Court, to ensure the efficient functioning of the individual employee's governmental unit and to prevent employees from "'constitutionaliz[ing] the employee grievance.'"[50]

Three Justices wrote dissenting opinions in *Garcetti*, sharply calling into question many aspects of the majority's reasoning. First, Justice Stevens's dissent advocated that constitutional protection should *sometimes* be available for government employees who speak out pursuant to their official job duties, rather than *never* available.[51] Justice Stevens reasoned that speech may merely be unwanted or unwelcome by the employer because it exposes information regarding the functioning of the governmental unit that the employer does not want anyone to discover.[52]

Second, Justice Souter's dissenting opinion, in which Justices Stevens and Ginsburg joined, also advocated against a categorical exclusion from First Amendment protection for public employee speech made pursuant to official duties, especially in cases of an employer's "official wrongdoing and threats to health and safety."[53] Justice Souter argued that the majority drew an arbitrary line without adequate justification for such a distinction and advised adjusting the *Pickering/Connick* balancing test to address the majority's concern for promoting the efficient functioning of the government unit.[54] Such an adjustment would require that speech be "on a matter of unusual importance and satisf[y] high standards of responsibility" in the manner of communication to be eligible for First Amendment protection.[55]

Third, Justice Breyer also dissented, finding the *Garcetti* exclusion from First

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47. *Id.* at 1959-60.

48. *Id.* at 1959.

49. *Id.* at 1958.

50. *Id.* at 1958-59 (quoting Connick v. Myers, 461 U.S. 138, 154 (1983)). "Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate. The employees retain the prospect of constitutional protection for their contributions to the civic discourse." *Id.* at 1960.

51. *Id.* at 1962 (Stevens, J., dissenting).

52. *Id.*

53. *Id.* at 1963 (Souter, J., dissenting).

54. *Id.* at 1965, 1967.

55. *Id.* at 1967 (noting that "only comment[s] on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor").

Amendment protection "too absolute."[56] Justice Breyer found relevant that Ceballos's speech was governed by the cannons of the legal profession and additionally that Ceballos, as a deputy prosecutor, had certain constitutional disclosure obligations respecting the government's possession of exculpatory evidence.[57] Therefore, Justice Breyer advocated applying the *Pickering/Connick* balancing test in those limited circumstances where public employee speech is governed by both professional cannons and constitutional obligations.[58]

III. PRELIMINARY INTERPRETATIONS OF "OFFICIAL DUTIES" UNDER *GARCETTI*

The *Garcetti* Court specifically refrained from "articulat[ing] a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate."[59] Instead, the Court instructed that the appropriate inquiry is a "practical one," involving assessment of what "duties an employee actually is expected to perform" and acknowledging that job descriptions often do not accurately reflect the duties with which an employee is actually tasked.[60] Without having occasion to provide specific guidance as to what constitutes an employee's official job duties, lower courts must find an appropriate standard by which to measure whether *Garcetti* applies to the speech at issue. This task has been met with varying approaches as lower courts grapple with *Garcetti* and search for a consistent and reliable framework with which to assess whether the speech at issue was made pursuant to an employee's official duties.

While nearly all circuit courts of appeals have already cited to *Garcetti* in at least limited fashion, as of the time of writing of this Note, the Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits have each engaged in a thorough analysis of *Garcetti* when determining whether speech was made pursuant to an employee's official duties. The sixteen decisions by the circuit courts of appeals that, at the time of writing of this Note, have fully explored this issue, have overwhelmingly interpreted *Garcetti* broadly enough to preclude all but five plaintiffs' First Amendment claims.[61] This strong initial trend by circuit

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56. *Id.* at 1974 (Breyer, J., dissenting).

57. *Id.*

58. *Id.* at 1975.

59. *Id.* at 1961 (majority opinion). Ceballos did not dispute that he wrote the memo pursuant to his calendar deputy duties. *Id.* at 1960. The district court in *Ceballos v. Garcetti* found the fact that Ceballos's memo requested permission to dismiss the charges against the defendants supported a determination that the memo was written as part of Ceballos's employment duties because Ceballos acknowledged the need for his superiors' permission. Ceballos v. Garcetti, No. CV0011106AHMAJWX, 2002 WL 34098285, at *6 n.5 (C.D. Cal. Jan. 30, 2002) (unpublished), *rev'd*, 361 F.3d 1168 (9th Cir. 2004), *rev'd*, 126 S. Ct. 1951 (2006).

60. *Garcetti*, 126 S. Ct. at 1961-62 (rejecting any attempt by employers to merely create overly broad job descriptions to widen the speech subject to the *Garcetti* exclusion from First Amendment protection).

61. *See* Fairley v. Fermaint, 482 F.3d 897, 902 (7th Cir. 2007) (noting that *Garcetti* does not

courts of appeals to find in favor of public employers in such cases may be due, in part, to virtually irrefutable evidence and deposition testimony by employees admitting the speech at issue was made pursuant to their employment duties.[62] The drastic shift in First Amendment protections afforded to public employees significantly benefited public employers who were already involved in litigation when *Garcetti* was issued and before plaintiffs became aware that their official duties were the threshold inquiry determining the constitutional protection afforded to their speech. The district court in *Ceballos v. Garcetti* noted Ceballos had, in fact, admitted that the disposition memo, which formed the core of his First Amendment claim, was written pursuant to his official duties as a prosecutor.[63] More recently, for example, the Eighth Circuit found that a letter written by a school psychologist clearly demonstrated the employee wrote the letter pursuant to official job duties and not as a public citizen when the letter closed with the statement, "'I consider any time I spend addressing this matter with you or the agency to be services I am giving the state as a consultant.'"[64] Following *Garcetti*, defendants will have a more difficult time demonstrating speech was made pursuant to official duties. Plaintiffs will justifiably respond to *Garcetti* through attempts to preserve their First Amendment protections by characterizing speech as that of a concerned citizen rather than as speech required

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apply to testimony given by county jail guards in inmates' suits because assisting prisoners in their litigation does not fall within the guards' official duties); Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1332-33 (10th Cir. 2007) (holding that statements made by a school superintendent to the Attorney General regarding the school board's alleged violations of the New Mexico Open Meetings Act survive *Garcetti*'s threshold requirement); Freitag v. Ayers, 468 F.3d 528, 544-46 (9th Cir. 2006) (finding, with one possible exception, no constitutional protection available for a female corrections officer's internal reports alleging sexually hostile inmate conduct and the prison's failure to rectify the situation, but holding that similar complaints made externally to a senator and the inspector general were made in the capacity of a citizen "expos[ing] such official malfeasance to broader scrutiny"); Fuerst v. Clarke, 454 F.3d 770, 774 (7th Cir. 2006) (finding *Garcetti* inapposite when a deputy sheriff's comments publicly criticizing the sheriff were made by the speaker in the capacity of a union representative, rather than pursuant to the official duties of a deputy sheriff); Hill v. Borough of Kutztown, 455 F.3d 225, 242-43 (3rd Cir. 2006) (finding as a matter of law, that a borough manager was speaking pursuant to official duties when reporting complaints about the borough mayor to the borough council, but reversing the district court's grant of a motion to dismiss a First Amendment retaliation claim for additional speech that could possibly have been made in the capacity of a citizen).

62. *See* Battle v. Bd. of Regents for Ga., 468 F.3d 755, 761 (11th Cir. 2006) (finding that a federal financial aid counselor's retaliation claim failed under *Garcetti* because she admitted in her deposition testimony that she had an employment duty to report the discovery of mismanagement or fraud in the financial aid records).

63. Ceballos v. Garcetti, No. CV0011106AHMAJWX, 2002 WL 34098285, at *6 (C.D. Cal. Jan. 30, 2002) (unpublished), *rev'd*, 361 F.3d 1168 (9th Cir. 2004), *rev'd*, 126 S. Ct. 1951 (2006).

64. Bailey v. Dep't of Elementary and Secondary Educ., 451 F.3d 514, 520 (8th Cir. 2006).

under official employment duties.[65]

A. Broad Interpretations of the Reach of Garcetti

The Seventh Circuit has construed the holding of *Garcetti* to reach further than public employee speech that is part and parcel of an employee's "core" job functions, finding that standard to be too narrow following *Garcetti*.[66] While *Garcetti* has predominantly been used to insulate the public employer from employee First Amendment claims of retaliation when the employee speaks pursuant to official duties, it has also been used by at least one circuit court of appeals when the speech at issue was *not* made pursuant to the employee's official duties.[67] The Seventh Circuit in *Piggee v. Carl Sandburg College*[68] cited the underlying principles of *Garcetti* in explaining its reasoning in affirming that a college could lawfully force a part-time cosmetology instructor to refrain from speech involving her views on homosexuality, even though her speech *did not* relate to her official job duties of instructing students in cosmetology.[69] The court noted that while the *Garcetti* decision was "not directly relevant[,] . . . it does signal the Court's concern that courts give appropriate weight to the public employer's interests."[70]

As a practical matter, extending the principles of *Garcetti* to influence and bear upon constitutional protections afforded to speech made in the capacity of a citizen and *not* made pursuant to an employee's official duties would seem to have far-reaching effects beyond those intended by the Supreme Court in *Garcetti*.[71] The Court in *Garcetti* acknowledged its prior decisions focused on the

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65. *See Casey*, 473 F.3d at 1329-30 (finding the parties' "principal briefs filed before *Garcetti* . . . cut against the result they wish this Court to reach after *Garcetti*" and that the parties have "swap[ped] positions to meet their respective litigation objectives"). The court noted that the defendants originally argued that the plaintiff acted ultra vires when reporting alleged financial eligibility violations to Head Start headquarters, while the plaintiff originally argued that she had a "duty" to report the wrongdoing. *Id.* Following *Garcetti*, the defendants' reply brief argued that the plaintiff was acting pursuant to her official duties as a superintendent or CEO of the Head Start program when reporting the violations, while the plaintiff argued that the speech was made in the capacity of a citizen. *Id.*

66. Spiegla v. Hull, 481 F.3d 961, 967 (7th Cir. 2007).

67. *See* Piggee v. Carl Sandburg Coll., 464 F.3d 667 (7th Cir. 2006).

68. 464 F.3d 667.

69. *Id.* at 668, 672.

70. *Id.* at 672. *Cf.* Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007) ("Our remark that *Garcetti* was 'not directly relevant' did not reflect doubt about the rule that employers are entitled to control speech from an instructor to a student on college grounds during working hours . . . . The speech to which the student (and the college) objected was not part of [the plaintiff's] teaching duties.").

71. *See* Garcetti v. Ceballos, 126 S. Ct. 1951, 1958 (2006) ("So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.").

"dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment."[72] However, in explaining the "theoretical underpinnings" of its First Amendment decisions, the Court reaffirmed that "[e]mployees who make public statements *outside* the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government."[73] The decisions of the Court do not prevent public employees from participation in public debate and civic discourse, but do eliminate their First Amendment protection when their speech is made "pursuant" to their official duties.[74]

Following *Garcetti*, the possibility of First Amendment protection remains for public employee speech made in an employee's capacity as a citizen and not pursuant to an employee's official duties, subject to the outcome of the *Pickering/Connick* balancing test.[75] The Court identified the proper inquiry as "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[76] As described in *Pickering*, this analysis involves weighing the interests of the employee in commenting on matters of public concern against the government entity's need to efficiently run its operations.[77] Therefore, as advocated by the Seventh Circuit in *Piggee*, if courts interpret *Garcetti* as signaling the Supreme Court's "concern that courts give appropriate weight to the public employer's interests,"[78] even in cases where the employee was speaking as a citizen, such a broad interpretation of the reach of *Garcetti* has the potential to permanently tip the *Pickering/Connick* balancing test in favor of the employer's interests regardless of the weight of the employee's interests in commenting on a matter of public concern. *Garcetti* was not intended to swallow up the *Pickering* balancing test. Rather, the scope of *Garcetti* was specifically limited by the Court to exclude "statements or complaints (such as those at issue in cases like *Pickering* and *Connick*) that are made outside the duties of employment."[79]

Perhaps the most expansive interpretation of the reach of *Garcetti* in determining whether an employee's speech is made pursuant to official job duties can be found in a recent opinion issued by the Tenth Circuit Court of Appeals.[80] In *Green v. Board of County Commissioners*, an employee of the county's Juvenile Justice Center who worked as a drug-lab technician and a detention officer, suspected that a drug test had produced a false positive result.[81] Green

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72. *Id.* at 1959 (quoting Rankin v. McPherson, 483 U.S. 378, 384 (1987)).
73. *Id.* at 1961 (emphasis added).
74. *Id.* at 1960.
75. *Id.* at 1958.
76. *Id.*
77. Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
78. Piggee v. Carl Sandburg Coll., 464 F.3d 667, 672 (7th Cir. 2006).
79. *Garcetti*, 126 S. Ct. at 1961.
80. *See* Green v. Bd. of County Comm'rs, 472 F.3d 794 (10th Cir. 2007).
81. *Id.* at 796.

had previously alerted her employers to the lack of a drug testing confirmation protocol, but was not met with support for establishing any testing confirmation policy.[82] Green took it upon herself to independently contact the testing equipment manufacturer to discuss reliability issues and sent the sample in question to an outside hospital for a confirmation test, which confirmed a false positive result.[83]

The court compared Green's speech with her written job description, finding ultimately that the case was more similar to *Garcetti* and others decided in its wake than to "activities undertaken by employees acting as citizens."[84] The court reasoned that:

> On the one hand, the speech and conduct at issue can be categorized as activities undertaken in the course of Ms. Green's job. She had the responsibility for collecting samples and testing them, and by extension, making sure the tests were as accurate as possible . . . . She also had the responsibility for communicating with clients and with third parties regarding testing. Under this view, by making arrangements for the confirmation test without consulting her supervisors, Ms. Green decided to ignore her supervisors' instructions . . . and thereby properly should be subject to discipline.
>
> On the other hand, one could argue that Ms. Green was not a policymaker and her job responsibilities focused on the logistics of taking tests and keeping records, so she was not required to improve the Center's system by advocating for a confirmation policy or obtaining the confirmation test. Under this view, by arranging for the confirmation test to underline the validity of her previously expressed concerns, Ms. Green was not doing the job she was hired to do, but was acting outside her day-to-day job responsibilities for the public good.[85]

In affirming the grant of summary judgment to the defendants on Green's First Amendment claim, the court noted that the "unauthorized obtaining of the confirmation test to prove her point[], inescapably invoke *Garcetti*'s admonishment that government employee's First Amendment rights do 'not invest them with a right to perform their jobs however they see fit.'"[86]

The *Green* decision raises two concerns. First, the court's analysis includes two very plausible interpretations of how Green's communications could be characterized; one interpretation affords her the possibility of constitutional protection while the other precludes protection. Granting summary judgment does not seem appropriate in this procedural posture, given that there appears to be a genuine issue of material fact as to whether the speech at issue was in fact made pursuant to Green's official duties.

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82. *Id.*
83. *Id.*
84. *Id.* at 799-801.
85. *Id.* at 800.
86. *Id.* at 801 (quoting Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006)).

Second, the court seems to be merging the concepts of communications that can subject a public employee to discipline for insubordination with concepts of communications that do not maintain constitutional protection under *Garcetti*. Certainly, an employer retains the right to discipline an employee for insubordination; *Garcetti* confirms that "[s]upervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission," and they have the "authority to take proper corrective action."[87] However, *Garcetti* was addressing a situation where the speech at issue was undisputedly made pursuant to official job duties. By contrast, Green's speech was "unauthorized" by her employers, which seems to be compelling evidence of insubordination, rather than speech characterized as official government communications, as in *Garcetti*. As such, if this unauthorized speech was *not* made pursuant to Green's official job duties, it is properly addressed by weighing the interests under the *Pickering/Connick* test, rather than by categorically stripping the speech of its constitutional protection.

B. Courts' Disparate Treatment of Public Versus Private Speech

While the Supreme Court held in *Givhan* that communications made by public employees *privately* can be afforded First Amendment protection,[88] early application of *Garcetti* has led to a sharp distinction in constitutional protection afforded to speech made privately versus publicly. The courts' disparate treatment of speech made privately and speech made publicly seems in direct conflict with *Givhan*.[89] As the Supreme Court noted in *Garcetti*, "[t]hat Ceballos expressed his views inside his office, rather than publicly, is not dispositive[,]" citing *Givhan* as support for that proposition.[90] The practical effect of the lower courts' application of *Garcetti* in this manner is to encourage employees who are considering speaking out about their official job duties to deviate from following internally established reporting guidelines for fear that their speech will be subject to the *Garcetti* exclusion from First Amendment protection. As cautioned by Justice Stevens in his dissenting opinion in *Garcetti*, the majority opinion encourages employees to air their grievances publicly rather than privately and to ignore chain-of-command protocols.[91] Preliminary applications of *Garcetti* bear out Justice Stevens's prediction; many courts have already held that speech

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87. *Garcetti*, 126 S. Ct. at 1960-61.

88. Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 412-13 (1979).

89. *See* Ceballos v. Garcetti, 361 F.3d 1168, 1176 (9th Cir. 2004) ("To deprive public employees of constitutional protection when they fulfill this employment obligation, while affording them protection if they bypass their supervisors and take their tales, for profit or otherwise, directly to a scandal sheet or to an internet political smut purveyor defies sound reason."), *rev'd*, 126 S. Ct. 1951 (2006).

90. *Garcetti*, 126 S. Ct. at 1959.

91. *Id.* at 1963 (Stevens, J., dissenting) ("[I]t seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.").

preserves constitutional protection when it is made to media outlets or to elected officials because such speech is not made pursuant to official duties. Perhaps the most striking evidence of a court basing constitutional protection, in part, on whether employee speech was made publicly or privately can be found in *Green*.[92] The court in *Green* found it persuasive that the plaintiff's speech at issue did not involve the plaintiff "communicating with newspapers or her legislators or performing some similar activity afforded citizens."[93] The application of *Garcetti* should depend upon more than whether the employee's speech was made to the media or to legislators. The message such an interpretation sends to a public employee is that if the employee fears retaliation from the employer for speech made pursuant to the employee's official job duties, then *Garcetti* can be circumvented if the employee makes enough noise. When viewed in light of *Garcetti*'s foundational purpose of providing government entities with a higher degree of control over employees' speech to better ensure the "efficient provision of public services,"[94] the judicially-created incentive to air grievances to the media tends to undermine the Court's declared purpose. Numerous cases follow to demonstrate this principle.

In *Freitag v. Ayers*, the Ninth Circuit held that a female corrections officer alleging sexual harassment by inmates was speaking as a citizen, outside of her official job duties, when she contacted a state senator and the Office of the Inspector General regarding the State's "failure to perform its duties properly, and specifically its failure to take corrective action to eliminate sexual harassment in its workplace."[95] Similarly, in *Benoit v. Board of Commissioners of the New Orleans Levee District*,[96] a federal district court held that the senior counsel for the Board of Commissioners of the New Orleans Levee District was not acting pursuant to his official duties when he sent letters to both Louisiana Governor Kathleen Blanco and U.S. Senator David Vitter regarding misuse of time and taxpayer money by the levee district officials in the months preceding Hurricane Katrina.[97] The court noted that the plaintiff's speech was that of a "citizen exposing misconduct and malfeasance" when he wrote the letters to Governor Blanco and U.S. Senator Vitter, and that it was not part of his duties to provide such information to the governor or the senator.[98]

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92. Green v. Bd. of County Comm'rs, 472 F.3d 794, 800 (10th Cir. 2007).

93. *Id. Accord* Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 694 n.2 (5th Cir. 2007) (finding significant that the case was different from *Pickering* in that it did not involve a letter to the local newspaper or school board).

94. *Garcetti*, 126 S. Ct. at 1958 (majority opinion). "Public employees . . . often occupy trusted positions in society. When they speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions." *Id.*

95. Freitag v. Ayers, 468 F.3d 528, 545-46 (9th Cir. 2006) (finding that plaintiff's "right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee").

96. 459 F. Supp. 2d 513 (E.D. La. 2006).

97. *Id.* at 515.

98. *Id.* at 518; *see also* Sassi v. Lou-Gould, No. 05 Civ 10450(CLB), 2007 WL 635579, at

By contrast, in *Mills v. City of Evansville, Indiana*,[99] a city police department sergeant discussed with other officers her opposition to a proposed plan to reallocate certain crime prevention officers to active duty.[100] In finding *Garcetti* applicable to the plaintiff's speech, the Seventh Circuit characterized the speech as "contributing to the formation and execution of official policy," specifically noting that at the time of the speech the plaintiff was on duty, in the workplace, and in uniform.[101] Applying similar reasoning, the Sixth Circuit in *Haynes v. City of Circleville, Ohio*,[102] found that a police officer, who worked part time as a handler in the police department canine unit, retained no constitutional protection against employer retaliation for a memorandum written to his police chief opposing cutbacks in training for canine handlers, which the plaintiff believed would likely pose a risk of harm to the public.[103] In relying on *Mills*, the court in *Haynes* explained that "[t]he fact that Haynes communicated *solely to his superior* also indicates that he was speaking 'in [his] capacity as a public employee contributing to the formation and execution of official policy,' not as a member of the public writing a letter to the editor as in *Pickering*."[104]

The critical question that emerges based on the circuit courts of appeals's holdings in *Mills* and *Haynes* is whether the outcomes would have been different had the plaintiffs not raised their concerns internally, but had voiced their opinions in a more public forum, similar to the plaintiffs in *Freitag* and *Benoit*. Specifically, Justice Stevens declared in his dissent the "notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong" and further "it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description."[105] Here, in direct contradiction to *Garcetti* and *Givhan*, many courts' interpretations of *Garcetti* seem to let constitutional protection for exactly the same words hinge on whether the plaintiff chose to speak out publicly rather than privately. The *Garcetti* opinion acknowledged this "perceived anomaly" and suggested that government employers can avoid it by establishing internal protocols and policies governing employee speech to "discourage [employees] from concluding that the safest avenue of expression is to state their views in public."[106] This recommendation serves to further limit the public employee's options by providing employers with alternative grounds on which

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*1, *3 (S.D.N.Y. Feb. 27, 2007) (noting a police chief was not acting within the scope of official duties when writing public letters critical of police funding policies to the city council and identifying himself as a "'resident taxpayer'").

99. 452 F.3d 646 (7th Cir. 2006).

100. *Id.* at 647.

101. *Id.* at 648.

102. 474 F.3d 357 (6th Cir. 2007).

103. *Id.* at 359-60.

104. *Id.* at 364 (quoting *Mills*, 452 F.3d at 646) (citation omitted) (emphasis added).

105. Garcetti v. Ceballos, 126 S. Ct. 1951, 1963 (2006) (Stevens, J., dissenting) (characterizing the majority's opinion as "misguided").

106. *Id.* at 1961 (majority opinion).

to base an employee's termination, namely, failure to follow employer-mandated internal protocols governing employee speech.

C. Lower Court Approaches to Determining Official Duties

In navigating through post-*Garcetti* waters, district courts are forced to establish their own framework for what constitutes a public employee's official duties. One court observed that "[a]s comprehensive as *Garcetti* is, we are still left without a standard or a guide to help us balance or maneuver through those public statements that may be mixed, or rather disguised because the scope of job responsibilities are not so manifest."[107] The district courts have placed emphasis on a wide variety of factors in defining the scope of an employee's official duties, often with conflicting and unpredictable results. The following illustrate a number of noteworthy preliminary interpretations of what constitutes speech pursuant to a public employee's official duties.

1. Job Relatedness Approach.—In *Pittman v. Cuyahoga Valley Career Center*,[108] while the court ultimately did not apply *Garcetti* to the speech at issue, the court determined that *Garcetti*'s analysis rests on "job relatedness."[109] The court reasoned that if the speech was "required" by the employee's job, *Garcetti* controls, precluding constitutional protection; if the speech is not categorized as "specifically job-related," then the availability of constitutional protection for the speech at issue is weighed by the *Pickering/Connick* balancing test.[110]

The job relatedness approach advocated by the *Pittman* court misconstrues the Court's limited guidance on what constitutes an employee's official duties. The Court carefully crafted its holding as targeting public employees' speech made "*pursuant* to their official duties."[111] The *Pittman* court instead based a portion of its *Garcetti* analysis of available constitutional protections on job relatedness.[112] A standard that broadly includes all job-related speech would be over-inclusive because it would encompass speech falling well outside an employee's *official* job duties. Other courts have identified the risk of widening *Garcetti* to encompass all job related speech and have declined to do so. Specifically, one court declined to "transform *Garcetti* into an impermeable rule that all speech by governmental officials, no matter the facts presented, is fully engulfed by their governmental duties" and expressly rejected applying *Garcetti* as a "bright-line rule—an all or nothing determination—on an employee's speech

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107. Jackson v. Jimino, No. 1:03-CV-722, 2007 WL 189311, at *16 (N.D.N.Y. Jan. 19, 2007) (noting the court's difficulty in determining whether the plaintiff was speaking pursuant to official job duties resulting in a material issue of fact).

108. 451 F. Supp. 2d 905 (N.D. Ohio 2006).

109. *Id.* at 929.

110. *Id.*

111. *Garcetti*, 126 S. Ct. at 1960 (emphasis added).

112. *Contra* McLaughlin v. Pezzolla, No. 06-CV-00376, 2007 WL 676674, at *6 (N.D.N.Y. Feb. 28, 2007) ("The fact that some of these matters may have been 'job related' does not mean, *a fortiori*, that [a] claim is barred under *Garcetti*.").

even if it tangentially concerns the official's employment."[113] The Supreme Court specifically anticipated an interpretation based on job relatedness and reaffirmed its prior holdings that the dispositive factor in *Garcetti* was not that the speech *related* to Ceballos's job.[114] Rather, the Court recognized that the "First Amendment protects some expressions related to the speaker's job."[115]

2. Effect of Statute.—Courts have also addressed the application of *Garcetti* in cases involving statutes or federal guidelines imposing a legal duty upon public employees. A number of courts have considered such statutory and regulatory requirements as a determinative factor in finding that speech was made pursuant to official duties. In *Pagani v. Meriden Board of Education*,[116] a teacher alleged retaliatory employment action for filing a report with the Department of Children and Families ("DCF") regarding a substitute teacher who showed middle school students photographs of his vacation, including a photograph of himself posing nude with two other nude females.[117] Although Pagani's supervisor discouraged him from reporting the incident to DCF, a Connecticut statute mandated reporting suspected child abuse to DCF, and the school's faculty had previously received training on statutory compliance.[118] The court found that when Pagani made the report to DCF, he "understood he was doing so because, as an educator, he had a duty to do so," and broadly held that reports made to DCF by teachers in Connecticut are afforded no constitutional protection under *Garcetti*.[119]

Taking a similar approach, the Tenth Circuit Court of Appeals in *Casey v. West Las Vegas Independent School District*[120] found the plaintiff acted within her official job duties as school district superintendent and chief executive officer of the school district's Head Start program when instructing a subordinate to contact the Federal Head Start regional office to report the school district's financial noncompliance with federal regulations.[121] The plaintiff acknowledged awareness that failure to report financial irregularities in the program could result in liability, but alleged that school board members repeatedly dismissed her concerns regarding financial noncompliance, discouraging her from further investigating the irregularities.[122] The Tenth Circuit cited civil and criminal statutes subjecting individuals to liability for knowingly submitting false claims, including imposing civil penalties, fines, and imprisonment.[123] The court was

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113. Jackson v. Jimino, 506 F. Supp. 2d 105, 109 (N.D.N.Y. 2007).

114. *Garcetti*, 126 S. Ct. at 1960.

115. *Id.*

116. No. 3:05-CV-01115 (JCH), 2006 WL 3791405 (D. Conn. Dec. 19, 2006).

117. *Id.* at *1-2.

118. *Id.* at *3.

119. *Id.* at *4.

120. 473 F.3d 1323 (10th Cir. 2007).

121. *Id.* at 1329-30.

122. *Id.* at 1326, 1330. An investigation by the United States Department of Health and Human Services ultimately revealed improper enrollment in the school's Head Start program and required repayment of over five hundred thousand dollars in federal aid awards. *Id.* at 1326.

123. *Id.* at 1330 n.7.

persuaded that, because federal law required such disclosure and the plaintiff conceded that she was required to report noncompliance to federal authorities, the plaintiff was acting pursuant to official duties rather than speaking as a citizen for First Amendment purposes.[124]

Extending *Garcetti* to categorically exclude all speech by a public employee that can be tied to a statutory or regulatory duty reaches too far, placing the public employee in an impossible position. The employee either remains silent to avoid employer retaliation, thereby failing to comply with the applicable statute or regulation, or the employee complies with the mandatory disclosure requirement risking backlash from the employer, including possible termination or demotion. Selecting either option is likely a losing proposition for the public employee when *Garcetti* is interpreted so expansively.[125] Ceballos argued this issue to the Court by identifying a federal regulation governing basic obligations of public employees that mandates that federal "[e]mployees shall disclose waste, fraud, abuse, and corruption to appropriate authorities."[126] Ceballos opposed adopting a rule that could strip First Amendment protection from all federal employees for compliance with this government regulation.[127]

These conflicting obligations were present in *Garcetti*, prompting Justice Breyer's recommendation that the *Pickering/Connick* balancing test be applied when constitutional and professional cannons govern the employee's speech.[128] Similarly, where statutory or regulatory duties command disclosure, the employee should not be penalized for compliance by being categorically stripped of constitutional protection for the very speech that the government mandated. Rather, in this circumstance, the interests of the parties should be weighed under the *Pickering/Connick* balancing test.

3. Expected Duty Versus Actual Performance.—Some courts distinguish whether *Garcetti* applies to public employee speech on the basis of what an employee is actually performing versus what the employer expects the employee to perform. A court might consider the employee's official duties to include

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124. *Id.* at 1330-31. *Accord* Battle v. Bd. of Regents for Ga., 468 F.3d 755, 761, 761 n.5 (11th Cir. 2006) (citing Department of Education Guidelines compelling federal financial aid workers to report suspected fraud to the Office of Inspector General or local law enforcement).

125. This problem has been characterized as catching a public employee "'on the horns of a dilemma,'" likely resulting in the employee being "gored" regardless of the employee's selected course of action. *The Supreme Court, 2005 Term—Leading Cases*, 120 HARV. L. REV. 273, 279 (2006) (quoting Brief of Ass'n of Deputy Dist. Attorneys & Cal. Prosecutors Ass'n as Amici Curiae in Support of Respondent at 2, Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (No. 04-473), 2005 WL 1767121).

126. Brief for Respondent at 50, Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (No. 04-473), 2005 WL 1801035 (quoting 5 C.F.R. § 2635.101(b)(11) (2005)).

127. *Id.* (citing the existence of corresponding state and local reporting obligations).

128. Garcetti v. Ceballos, 126 S. Ct. 1951, 1975 (2006) (Breyer, J., dissenting) ("Where professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented, the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available.")

those duties the employer *expects* the employee to perform, not those duties the employee is actually performing. For example, the court in *Barclay v. Michalsky*[129] found *Garcetti* did not control when a nurse reported other nurses were sleeping on the job and using excessive restraints on patients, even though certain work rules technically imposed a requirement that employees report behavior that endangers the welfare of others and report any rule violations.[130] The court found the following significant: the rules involved a *general duty* by all employees, the plaintiff had not received special training on such rules or rule violations, and the plaintiff alleged that attempts to report such work rule violations were discouraged by superiors.[131] These facts proved persuasive to the court that while there may have been an *actual* duty to report the misconduct, such reporting was not *expected* of employees and the speech fell outside *Garcetti*'s control.[132]

Taking an opposite approach, the district court in *D'Angelo v. School Board of Polk County, Florida*,[133] appeared to rest its decision on the duties *actually* performed and engaged in by a school principal rather than the duties the employer *expected* the principal to perform.[134] D'Angelo was hired as a high school principal of a school scoring poorly on standardized tests, having crime and drug problems, and lagging behind the performance of other area high schools.[135] After implementing drastic changes with marked success, D'Angelo ultimately determined that pursuing charter school conversion was necessary to improve the quality of education available to the students.[136] This conversion effort was met with opposition by the school board, allegedly resulting in D'Angelo's termination.[137]

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129. 451 F. Supp. 2d 386 (D. Conn. 2006).

130. *Id.* at 395-96.

131. *Id.* ("Defendants have not demonstrated that reporting potential work rule violations relating to patient care was particularly within the province of plaintiff's professional duties, more so than that of any other . . . employees."); *see also* Burke v. Nittman, No. 05-cv-01766-WYD-PAC, 2007 WL 691206, at *1, *5 (D. Colo. Mar. 2, 2007) (finding unpersuasive under *Garcetti* that a security officer for a youth corrections facility may have had a "general" duty to report staff members' unethical behavior); Abbatiello v. County of Kauai, No. 04-00562 SOM/BMK, 2007 WL 473680, at *10 (D. Haw. Feb. 7, 2007) (noting that the mere existence of police department standards of conduct mandating certain types of officer reporting is not dispositive in establishing an officer's official duties because an officer may not actually be expected to perform such reporting functions).

132. *Barclay*, 451 F. Supp. 2d at 395-96.

133. Transcript of Rule 50 Motion and Judge's Findings, D'Angelo v. Sch. Bd. of Polk County, Fla., No. 8:05-CV-563-T-26TMB (M.D. Fla. June 15, 2006), *aff'd*, 497 F.3d 1203 (11th Cir. 2007).

134. *Id.* at 39-40.

135. Initial Brief of Appellant at 2-3, *D'Angelo*, 497 F.3d 1203 (11th Cir. 2007) (No. 06-13582), 2006 WL 2840509.

136. Transcript of Rule 50 Motion and Judge's Findings, *supra* note 133, at 10.

137. Initial Brief of Appellant, *supra* note 135, at 9, 11-13.

At trial, D'Angelo indicated his primary duty as principal was to do whatever was required for the students.[138] Broadly interpreting *Garcetti*, a Florida district court reluctantly granted the defendant's Rule 50(a) motion for judgment as a matter of law on D'Angelo's First Amendment claim, determining that *Garcetti* mandated a finding that D'Angelo was performing his official duties when he pursued converting the public high school into a charter school.[139] The court was not persuaded D'Angelo was acting outside of the scope of his official duties when pursuing charter conversion regardless of evidence that the school board strongly opposed charter school conversion and, ironically, that succeeding in a conversion would ultimately sever D'Angelo's employment relationship with the school board.[140] The court considered the conversion to be "part and parcel of his official duties," finding persuasive that the legislature designated the principal as one of the few parties that could seek conversion.[141]

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138. *Id.* at 9 (noting D'Angelo's trial testimony stressing that a principal's duty is to help students succeed in any way possible). D'Angelo argued that he was not required to pursue charter status and that his lengthy job description involved school management tasks and generally meeting students' needs. *Id.* at 6. Specific duties included "developing educational programs, evaluating personnel, conferring with teachers, students, and parents, requisitioning supplies, and planning and monitoring the budget." *Id.*

139. Transcript of Rule 50 Motion and Judge's Findings, *supra* note 133, at 39-42 (explaining Judge Lazzara's reluctance to grant the defendant's motion as defendant's actions were "morally outrageous" and "unconscionable," but granting the motion was required under *Garcetti*). Judge Lazzara apologized to the plaintiff for his decision, calling the remedy available to the plaintiff "hollow" based on *Garcetti*'s holding. *Id.* at 42. Further, Judge Lazzara encouraged the plaintiff to appeal the decision, stating he "hope[s] the Eleventh Circuit reverses [him] and says [he was] wrong." *Id.*

140. *Id.* at 27.

141. *Id.* at 39-40. Plaintiff argued that a mere grant of statutory authority to pursue charter status does not translate into an official duty under *Garcetti*. Initial Brief of Appellant, *supra* note 135, at 13.

Following the writing of this Note, the Eleventh Circuit Court of Appeals affirmed the district court's decision in this case. D'Angelo v. Sch. Bd. of Polk County, Fla., 497 F.3d 1203, 1206 (11th Cir. 2007). The Eleventh Circuit found that D'Angelo did not speak as a citizen for First Amendment purposes for at least two reasons. *Id.* at 1210. First, the court identified that, under Florida statute, only certain parties, including school boards, principals, teachers, parents, and the school advisory council, were granted the authority to apply for charter conversion. *Id.* Having no evidence that D'Angelo was a parent or a teacher, the court determined that his attempts to convert the school to charter status must have been performed in his capacity as principal. *Id.* Second, the court relied on D'Angelo's own admission that his efforts to convert to charter status were performed in fulfillment of his professional duties. *Id.* Although the court acknowledged that D'Angelo was not expressly assigned the duty of pursuing charter conversion, it found persuasive that he admitted pursing charter conversion to "'explore any and all possibilities to improve the quality of education at [his school],' which was one of his listed duties and he described as his 'number one duty' in his 'job as a principal.'" *Id.* (citing Battle v. Bd. of Regents for Ga., 468 F.3d 755, 761 (11th Cir. 2006)). The court was not persuaded that these statements regarding his duty

As evidenced in *D'Angelo*, drawing a clear constitutional distinction between speech made pursuant to employment duties an employee was *expected to perform* and speech made pursuant to what the employee was *actually performing* seems a somewhat arbitrary place to make such a critical assessment. If D'Angelo was not performing what he was expected to perform by the school board, he was arguably acting outside of the scope of his official duties by pursuing the charter school conversion. Certainly the principal was not, in the language of *Garcetti*, "expected to perform" and pursue charter school conversion as part of his official duties as evidenced by the fact that this course of action conflicted with the school board's objectives, but it is what he *actually* performed. However, the district court broadly held he was acting pursuant to his official duties based on D'Angelo's sense of duty to "do[] the best he could for the students" and make changes to improve the school.[142] Such differentiations do not appear to adhere to the practical inquiry recommended in *Garcetti.* Rather, distinctions in constitutional protections afforded to speech, made strictly on the basis of expected duties versus actual duties are problematic because of the dynamic nature of many employment relationships, ultimately rendering such distinctions impractical.

As discussed, under *Garcetti* a court's inquiry into what constitutes official duties is a "practical one" and should focus on the duties an employee is actually "expected to perform."[143] Although dicta in *Garcetti* rejects any effort by employers to create overly-broad job descriptions so as to preclude as much employee speech as possible from First Amendment protection,[144] employers could conceivably craft vague or overly-inclusive job descriptions in an attempt to tie as much employee speech as possible to official job duties. Justice Souter envisions that the "government may well try to limit the English teacher's options by . . . investing them with a general obligation to ensure the sound administration of the school." [145] As a tangible example, consider also that in *D'Angelo*, the principal expansively described his primary responsibility as a duty, generally, to do whatever possible for the success of the students. Such a broad job duty could easily be inserted by employers into future principals' official job descriptions to further insulate employers from liability for retaliatory employment actions resulting from employee speech tied to this general duty.

The range of factors and considerations that lower courts have utilized to define a public employee's official duties demonstrates the difficulty involved in properly applying the bright-line rule announced in *Garcetti* to vastly different factual scenarios. *Garcetti* is an anomaly, in that Ceballos's speech was undisputedly made pursuant to his official duties as a calendar deputy. This type of definiteness with respect to official duties will not likely be found in the

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to pursue charter status only reflected D'Angelo's "moral obligations as a human being and not his responsibilities as a principal." *Id.*

142. Initial Brief of Appellant, *supra* note 135, at 13.

143. Garcetti v. Ceballos, 126 S. Ct. 1951, 1961-62 (2006) (majority opinion).

144. *Id.* at 1961.

145. *Id.* at 1965 n.2 (Souter, J., dissenting).

majority of First Amendment claims involving public employer retaliation for employee speech. Accordingly, the facts of *Garcetti* cannot be easily analogized to assist courts in determining whether the speech at issue overcomes *Garcetti*'s threshold requirement. Further, public employees are left with uncertainty as to their constitutional free speech rights, and their reliance interests are damaged as a result of this unpredictability. *Garcetti* establishes a new pronouncement of law that profoundly affects a core, constitutionally-protected right without providing sufficient guidance on how to appropriately apply this requirement to varied factual situations.

IV. POLICY CONCERNS ARISING FROM *GARCETTI*

The effective operation of government entities undoubtedly is of paramount importance to a properly functioning society. Justice Breyer recognized that the "efficient administration of legislatively authorized programs reflects the constitutional need effectively to implement the public's democratically determined will."[146] However, while *Garcetti* identified this goal as the paramount reason behind its holding, other equally important policy considerations have arisen resulting from the removal of citizen status from public employees speaking pursuant to official job duties.

The *Garcetti* Court sought to avoid continued judicial involvement in a vast majority of the constitutional claims brought by public employees through its new pronouncement of law in *Garcetti*. The Court supported its holding, in part, by stating to "hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers."[147] Following *Garcetti*, the determination of whether a public employee's speech is made in the capacity of a citizen on a matter of public concern remains a question of law for the court.[148] However, the effect of *Garcetti* on courts' involvement has resulted in numerous disputes of material fact centered on the issue of what actually constitutes a public employee's official duties.[149] As Justice Souter aptly predicted in his dissent, the majority's holding in *Garcetti* "engender[s] litigation to decide which stated duties were actual and which were merely formal."[150] Therefore, rather than having the intended effect of removing public employees' First Amendment claims from judicial purview, the courts' role in such constitutional claims has merely shifted.

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146. *Id.* at 1973 (Breyer, J., dissenting).

147. *Id.* at 1961 (majority opinion).

148. McGee v. Pub. Water Supply, 471 F.3d 918, 920 (8th Cir. 2006).

149. *See* Kodrea v. City of Kokomo, Ind., 458 F. Supp. 2d 857, 868 (S.D. Ind. 2006) (denying defendants' motion for summary judgment because of factual issues surrounding the scope of plaintiff's job responsibilities); Shewbridge v. El Dorado Irrigation Dist., No. CIV. S-05-0740 FCD EFB, 2006 WL 3741878, at *7 (E.D. Cal. Dec. 19, 2006) (identifying factual issues regarding plaintiff's job responsibilities that precluded granting defendant's motion for summary judgment).

150. *Garcetti*, 126 S. Ct. at 1965 n.2 (Souter, J., dissenting).

The *Pickering* Court properly assessed the difficulty in establishing a bright-line rule governing First Amendment protection for public employee speech. Its previously articulated principle cautioned:

> Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.[151]

The principle of addressing these issues on a case-by-case basis reflected a high regard for the preservation of public employee free speech rights. By adopting this view, the Court essentially acknowledged that First Amendment claims are inherently fact sensitive and are thus better suited to a balancing of the interests based on the individual facts of each case than to a per se rule governing public employee First Amendment protection.

Garcetti conflicts with this previously articulated principle, and its per se rule draws an arbitrary line by holding that public employees are not citizens when they speak pursuant to their official job duties. The Fifth Circuit Court of Appeals explains *Garcetti* as shifting the "focus from the content of the speech to the role the speaker occupied when he said it."[152] This new rule—this judicial line in the sand—does a disservice to society by categorically limiting society's access to critical information on topics of public interest and concern. The Fifth Circuit expressed the current judicial approach as holding "[e]ven if the speech is of great social importance, it is not protected by the First Amendment so long as it was made pursuant to the worker's official duties."[153] Justice Souter characterized the result as protecting a *Givhan* schoolteacher who speaks to a principal regarding school hiring policies, but not protecting a school personnel officer whose speech addresses the principal's failure to hire minority candidates.[154] Ceballos suggested the problematic effects of the per se rule in several scenarios:

> Suppose, for example, that a Capitol Police officer patrols the Capitol daily, looking for suspicious unattended packages, and every day she files a report with her findings. One day, the officer discovers a package containing a bomb; furthermore, after an investigation, she learns that a fellow police officer planted it. She reports her findings and is discharged. Similarly, imagine that a U.S. Customs Service employee

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151. Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968); *see also id.* at 574 ("This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors.").

152. Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 692 (5th Cir. 2007).

153. *Id.*

154. *Garcetti*, 126 S. Ct. at 1965 (Souter, J., dissenting).

> learns that some of his colleagues have been accepting bribes from a foreign entity, known to have ties to terrorist organizations, to ignore certain shipments when they arrive at U.S. ports. He reports his discovery and is fired.[155]

Ceballos argued to the Court that "it would be perverse to protect speech of such public significance *less* because the person *best* situated to alert his agency to the danger was the one who spoke."[156]

The obvious query resulting from these examples is who is better suited to speak on issues of public health, safety, and ethical breaches than those most closely involved, and whose speech does society *most* need to hear on such subjects? The Supreme Court's pre-*Garcetti* decisions resoundingly affirmed the "necessity for informed, vibrant dialogue in a democratic society" and identified that "widespread costs may arise when dialogue is repressed."[157] The hypothetical scenarios suggested by Ceballos illustrate the incongruous result of *Garcetti*. The practical application of *Garcetti* takes away the constitutionally protected voice of public employees who are most familiar with the issues on which they may need to speak out and arguably those on which they are the most knowledgeable in their respective fields. The costs of silence are too high to provide the U.S. Customs officer or the Capitol Police officer with an incentive to withhold disclosure of critical information involving these matters of public concern for fear of retaliatory action by an employer.

A related criticism of *Garcetti* is that its effect is too far-reaching. *Garcetti* touches every person who makes the decision to become a public servant—teachers, bus drivers, police officers, public defenders, prosecutors, politicians—and strips them of their constitutional protection for speech made pursuant to their official duties. *Garcetti* simply affects too much speech. According to the 2005 U.S. Census Public Employment Data statistics, there are 18,361,208 federal, state, and local full time public employees.[158] The Supreme Court previously expressed "serious concerns" about widespread prohibitions on public employee speech, specifically relating to a ban that "chills potential speech before it happens."[159] This exclusion from First Amendment protection will likely discourage public employees from stepping forward to disclose misconduct

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155. Brief for Respondent, *supra* note 126, at 43.

156. *Id. Accord Garcetti*, 126 S. Ct. at 1965 (Souter, J., dissenting) (noting that "it seems obvious that the individual and public value of such speech is no less, and may well be greater, when the employee speaks pursuant to his duties in addressing a subject he knows intimately for the very reason that it falls within his duties").

157. *Garcetti*, 126 S. Ct. at 1959 (majority opinion).

158. U.S. CENSUS BUREAU, FEDERAL GOVERNMENT CIVILIAN EMPLOYMENT BY FUNCTION: DECEMBER 2005, http://ftp2.census.gov/govs/apes/05fedfun.pdf; U.S. CENSUS BUREAU, 2005 PUBLIC EMPLOYMENT DATA—STATE AND LOCAL GOVERNMENTS, http://ftp2.census.gov/govs/apes/05stlus.txt.

159. United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 468 (1995).

and wrongdoing in the public workplace. As Gerald McEntee, President of the American Federation of State, County and Municipal Employees, observed:

> This decision gives constitutional sanction to those who would fire a public worker for stepping forward to preserve the integrity of our public institutions as a government whistleblower.
>
> Government employees should not be asked to sacrifice their First Amendment rights to work in the public sector. . . . [W]e ought to protect rank-and-file public employees who are courageous enough to risk their own careers to speak out about possible violations of the law or ethical breaches.[160]

As discussed, early findings demonstrate that interpretation and application of *Garcetti* have proven difficult for the courts. This is due in large part to the fact that the Court created a critical threshold requirement, yet refrained from establishing a framework by which lower courts can reliably implement this requirement. Not only was no framework provided, but the Court specifically refrained from deciding whether *Garcetti*'s analysis applies in the context of "academic scholarship or classroom instruction."[161] Failure to expressly carve out academic scholarship from the reach of *Garcetti* has raised significant concerns and commentary. Justice Souter identified that *Garcetti* is potentially "spacious enough" to encompass teaching in public universities and colleges and thereby eliminate constitutional protection for educators whose speech is required based on their official duties.[162] The majority's failure to explore its application to public employee speech involving scholarship or teaching will force lower courts to wrestle with this complex issue.

While no circuit courts of appeals have, as of the time of writing of this Note, specifically addressed *Garcetti*'s application to academic freedom in the post-secondary education setting, the Seventh Circuit Court of Appeals recently addressed how *Garcetti* applies in the context of the primary school setting in *Mayer v. Monroe County Community School Corp.*[163] In *Mayer*, an elementary school teacher claimed a violation of her First Amendment rights when her contract allegedly was not renewed because she expressed a political viewpoint

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160. Press Release, American Federation of State, County and Municipal Employees, *supra* note 1; *see also* Williams v. Riley, 481 F. Supp. 2d 582, 584-85 (N.D. Miss. 2007) (denying First Amendment protection where an officer reported a fellow officer for beating an inmate and stating the court is "gravely troubled" by the effect of *Garcetti* on such a factual scenario).

161. *Garcetti*, 126 S. Ct. at 1962.

162. *Id.* at 1969 (Souter, J., dissenting).

163. 474 F.3d 477, 478 (7th Cir. 2007). The Fourth Circuit, however, declined to apply *Garcetti* in a case involving a First Amendment claim relating to education, noting that the Supreme Court refrained from determining whether *Garcetti* is applicable in the educational setting. Lee v. York County Sch. Div. 484 F.3d 687, 694 n.11 (4th Cir. 2007). Rather, the Fourth Circuit instead chose to continue its application of *Pickering/Connick* in circumstances involving education. *Id.*

in her current-events class discussion.[164] Parents complained, and the principal instructed the faculty to refrain from voicing opinions concerning political debates.[165] In an opinion written by Chief Judge Easterbrook, the Seventh Circuit determined that *Garcetti* applied to Mayer's speech because the current-events lesson Mayer taught was considered part of her assigned duties.[166] The court held the "first amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system."[167]

Although the Seventh Circuit specifically left open the issues of the breadth of "constitutional protection of scholarly viewpoints in post-secondary education," publications by primary and secondary teachers, and speech made by teachers outside of the classroom,[168] the court's reasoning in *Mayer* raises concerns for the protection of academic freedom in the post-secondary setting as well. Specifically, the court found that the "school system does not 'regulate' teachers' speech as much as it *hires* that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary."[169] Further explaining its reasoning, Chief Judge Easterbrook identified that the facts of *Mayer* made for an easier case for the employer to prevail than the facts of *Garcetti* because "teachers hire out their own speech and must provide the service for which employers are willing to pay."[170] Thus, Mayer could discuss all sides of political controversies with her class, but could not express opinions on such topics.[171] Such a restriction on the free expression of opinions and exchange of ideas in the public university or college setting would severely restrict, if not eliminate, educators' ability to contribute in a meaningful way to scholarly dialogue or writing.[172] In order to adequately safeguard the vital role played by

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164. *Mayer*, 474 F.3d at 478.

165. *Id.* The teacher alleged that she answered a student's inquiry regarding whether she had participated in a demonstration against the United States' involvement in Iraq. *Id.* She informed the student that she honked her car horn in response to a sign encouraging motorists to "'Honk for Peace.'" *Id.*

166. *Id.* at 480.

167. *Id.*

168. *Id.*

169. *Id.* at 479.

170. *Id.* at 479-80 (noting as a particularly compelling factor that primary school students represent a captive audience, and the "Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials").

171. *Id.* at 480.

172. *See* Brief of Amici Curiae the Thomas Jefferson Center for the Protection of Free Expression, and the American Association of University Professors at 7, Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (No. 04-473), 2005 WL 1801034 ("Indeed, the most valuable contributions that most university scholars and teachers make to public debate and understanding typically derive from their academic disciplines or fields of expertise. Thus, any suggestion that 'matters of public concern' may not encompass job-related expression of professors would undermine the special protections the Court has given academic freedom for the past 50 years. Adoption of such a view

public educators in the post-secondary education arena, *Garcetti* should not be applied in the academic scholarship context.[173]

The numerous policy concerns arising from the early applications of *Garcetti* signal a warning that courts must seek to narrowly interpret *Garcetti* when defining a public employee's official duties. The *Connick* Court declared that its "responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government."[174] The *Garcetti* Court affirmed the authority and relevance of *Connick,* yet maneuvered around this self-identified responsibility to preserve public employee constitutional rights by eliminating citizenship status for those public employees speaking pursuant to official job duties. Public employees have a compelling interest in speaking on matters of public concern, and that interest is in no way lessened when the employee's official duties require such speech. As such, it does not seem appropriate to categorically preclude such speech from First Amendment protection when a public employee's duties require speech on a matter of public concern, such as, bringing health, safety, or ethical violations to light.

Society at large also holds a corresponding interest in hearing speech on matters of public concern. The *Garcetti* Court reaffirmed its prior decisions that if public employees were "'not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.'"[175] Courts applying a broad interpretation of *Garcetti* serve to further frustrate citizens' participation in critical dialogue by stifling the vital exchange of ideas so fundamental to our society's ideals. As expressed in *Connick*, "'[s]peech concerning public affairs is more than self-expression; it is the essence of self-government.'"[176] Applying a narrow interpretation of the meaning of "pursuant to their official duties" would encourage public employees' speech on matters of public concern by providing a greater likelihood for obtaining constitutional protection for their speech, ultimately furthering society's interest in receiving important commentary on matters of public concern.

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would also create a perverse irony: Constitutional protection for a professor's speech would now extend only to those public statements on which the speaker was *least well informed*, while denying such protection to statements reflecting the speaker's academic expertise. . . .").

173. *See id.* ("[T]he Court has not wavered in identifying the university as 'a traditional sphere of free expression so fundamental to the functioning of society' that First Amendment concerns apply with special force." (quoting Rust v. Sullivan, 500 U.S. 173, 200 (1991))).

174. Connick v. Myers, 461 U.S. 138, 147 (1983).

175. Garcetti v. Ceballos, 126 S. Ct. 1951, 1959 (2006) (majority opinion) (quoting City of San Diego, Cal. v. Roe, 543 U.S. 77, 82 (2004)). The Court also recognized that "large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said." *Id.* (quoting United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 470 (1995)).

176. *Connick*, 461 U.S. at 145 (quoting Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964)).

CONCLUSION

Courts confronted with evaluating whether *Garcetti* precludes First Amendment protection for public employee speech should take a narrow interpretation of *Garcetti* when defining "official duties" to minimize unjustifiable interference with constitutional protection for speech on matters of public concern. Adopting a narrow interpretation requires defining an employee's official duties such that they are not distorted or inflated in an artificial attempt to subject more speech to *Garcetti*. Courts must specifically reject any attempt to invest public employees with vague, over-reaching employment duties or general whistleblower duties in order to trigger the application of *Garcetti*. Additionally, courts must not deem legal or regulatory duties to be conclusive evidence that speech made in compliance with such obligations is necessarily made pursuant to official duties.

The interests of the public in receiving informed speech and the interests of the public employee in making informed speech demand minimal interference with such expressions. The elementary school bus driver needs to raise his concerns regarding bus inspection violations. The levee district official needs to communicate her observations on levee maintenance and safety. The police officer needs to raise allegations of police brutality. Society needs to be afforded the opportunity to hear speech on such matters of public concern. As the Supreme Court reaffirmed in *Connick*, "speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection."[177] Rejection of a broad interpretation of the meaning of "pursuant to their official duties" is one meaningful step toward returning speech by public employees on matters of public concern to its rightful place in the hierarchy of First Amendment protection.

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177. *Id.* (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)).

INDIANA'S BROWNFIELDS INITIATIVES: A VEHICLE FOR PURSUING ENVIRONMENTAL JUSTICE OR JUST BLOWING SMOKE?

ONI N. HARTON*

INTRODUCTION

Dilapidated warehouses, unused gas stations, inactive factories, and other abandoned commercial and industrial properties litter the landscape in many older industrial regions throughout the United States.[1] These sites "drive down property values" and "contribute to community blight," while generating "little or no tax revenue."[2] Consider one such Indiana property. A ten-acre piece of land sat on the edge of a predominately minority city, vacant for over two decades.[3] "Midnight dumpers" frequented the site. This illegal dumping over the years resulted in the accumulation of "monstrous proportions" of garbage.[4] For years, fears of contamination hindered the site's redevelopment. An environmental assessment indicated that removing the heaps of toxic trash would enable redevelopment to continue without further cleanup.

Next, the state investigated and identified the illegal dumpers, who incurred cleanup costs. Investors redeveloped the property. Soon after the property's redevelopment, a neighboring company purchased the lot and expanded its operations. Throughout the assessment, cleanup, and redevelopment process, project officials kept the community apprised of the site's progress. The company's expansion onto the former vacant lot increased its business, provided additional employment opportunities for the city, and contributed to the tax rolls.[5]

The preceding scenario describes a successful brownfields redevelopment project. Brownfields are properties where the presence or potential presence of contamination complicates its expansion, redevelopment, or reuse.[6] Typically located in urban centers populated by predominately minority and lower-income populations, brownfields properties once played a vital role in commerce and industry.[7] Actual or perceived contamination, however, caused developers to

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1. H.R. REP. NO. 109-608, pt. 1, at 2 (2006).

2. *Id.*

3. *See* EPA, *Brownfield Success Stories: East Chicago Turns Garbage into Gold*, http://www.epa.gov/brownfields/html-doc/ss_nwndi.htm (last visited Mar. 5, 2007) (discussing the redevelopment of a ten-acre property in East Chicago, Indiana).

4. *Id.*

5. *See id.*

6. *See* Bradford C. Mank, *Reforming State Brownfield Programs to Comply with Title VI*, 24 HARV. ENVTL. L. REV. 115, 120 (2000).

7. *See* Emily A. Green, *The Rustbelt and the Revitalization of Detroit: A Commentary and*

largely ignore such properties in recent years.[8] In many instances, developers have focused their efforts on "greenfields," undeveloped land on the outskirts of cities that require little or no environmental remediation or attendant development delay.[9] Greenfields provide an attractive alternative for developers because numerous impediments hinder brownfields redevelopment.[10] Yet there is hope.

The advent of federal and state incentive programs over the past decade has significantly reduced barriers hampering brownfields redevelopment.[11] As a result, brownfields programs have returned thousands of properties to economically and socially productive uses.[12]

Indiana, along with the vast majority of states,[13] has implemented brownfields initiatives.[14] Indiana's program mentions environmental justice as a key concern.[15] "Environmental justice is the fair treatment . . . of all people . . . with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[16] "Brownfields redevelopment is closely associated with environmental justice because it [often] targets neighborhoods that have . . . not benefited from economic prosperity."[17] However, with only minimal substantive requirements relating to environmental justice, Indiana's programs may fail to adequately address this crucial concern.

This Note explores pursuing a proactive approach to achieving environmental justice in the context of brownfields redevelopment in Indiana. Public participation is the linchpin of a successful brownfields project incorporating environmental justice concerns.[18] Indiana's programs contain minimal public

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Criticism of Michigan Brownfield Legislation, 5 J.L. SOC'Y 571, 572 (2004).

8. *See* Todd S. Davis, *Defining the Brownfields Problem*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 3, 7 (Todd S. Davis ed., 2002) [hereinafter BROWNFIELDS: A COMPREHENSIVE GUIDE].

9. *See* Stephen M. Johnson, *The Brownfields Action Agenda: A Model for Future Federal/State Cooperation in the Quest for Environmental Justice?*, 37 SANTA CLARA L. REV. 85, 95 (1996).

10. *See* H.R. REP. NO. 109-608, pt. 1, at 2 (2006).

11. *See id.*

12. *See id.*

13. *See* NATIONAL BROWNFIELDS ASSOCIATION, WHAT WORKS: AN ANALYSIS OF STATE BROWNFIELD AND VOLUNTARY CLEANUP PROGRAMS 1, http://www.brownfieldassociation.org/portals/0/pdf/NBA_Program_Analysis.pdf (last visited Oct. 8, 2007).

14. *See* IND. CODE § 13-19-5-1 (Supp. 2007); *see also* IND. CODE § 13-25-5-1 (2004).

15. *See* Ind. Fin. Auth., *Indiana Brownfields Program*, http://www.in.gov/ifa/brownfields/ (last visited Mar. 5, 2007).

16. *See* EPA, *Environmental Justice*, http://www.epa.gov/compliance/environmentaljustice/index.html (last visited Mar. 5, 2007).

17. MOLLY SINGER ET AL., RIGHTING THE WRONG: A MODEL PLAN FOR ENVIRONMENTAL JUSTICE IN BROWNFIELDS REDEVELOPMENT 8 (2001), *available at* http://www.lgean.org/documents/Righting%20the%20Wrong.pdf.

18. *See generally* Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, *in* BROWNFIELDS LAW AND PRACTICE: THE CLEANUP AND REDEVELOPMENT OF

participation requirements.[19] Therefore, Indiana's brownfields initiatives are on track to be minimally successful as a vehicle for pursuing environmental justice.

Part I provides background on brownfields. Specifically, this Part addresses the definition, nature, causes, and effects of brownfields sites, along with the barriers and benefits to redevelopment. Part II defines environmental justice and explores its intersection with brownfields redevelopment. Part III focuses on current laws impacting brownfields. This Part highlights federal and state legislative measures impacting brownfields. Part IV describes Indiana's brownfields initiatives: The Voluntary Remediation Program and the Indiana Brownfields Program. Part V analyzes Indiana's brownfields initiatives with respect to environmental justice considerations. Finally, Part VI posits that Indiana's brownfields initiatives should bolster the substantive requirements for public participation in order to adequately address environmental justice concerns. Specifically, this Part recommends that Indiana should adopt the use of technical assistance grants and community workgroups to facilitate meaningful public participation.

I. BACKGROUND

Part I provides background on brownfields. Specifically, this Part provides a definition of brownfields followed by a description of the nature and extent of the problem. Next, this Part explores the various barriers to brownfields redevelopment. Finally, this Part discusses the positive attributes of brownfields redevelopment.

A. Defining the Problem

Most older cities and towns have abandoned and contaminated land, commonly referred to as "brownfields," within the heart of the city.[20] "The most widely accepted definition of what constitutes a brownfields site is [employed] by the U.S. Environmental Protection Agency ('EPA')."[21] The EPA defines brownfields as, "property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."[22] Occasionally, "brownfields are defined as only sites

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CONTAMINATED LAND 31-1, 31-6 (Michael B. Gerrard ed., 2006) [hereinafter BROWNFIELDS LAW AND PRACTICE].

19. *See generally* IND. CODE § 13-19-5-8 (Supp. 2007); IND. CODE § 13-25-5-11 (2004).

20. Johnson, *supra* note 9, at 94.

21. William W. Buzbee, *Nature and Effects of the Brownfields Problem*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-4.

22. EPA, *Brownfields Mission*, http://www.epa.gov/brownfields/mission. htm (last visited Mar. 5, 2007). The brownfields definition is found in the Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356, 2361 (2002). Indiana, for example, defines a brownfield as

> a parcel of real estate: (1) that (A) is abandoned or inactive; or (B) may not be operated at its appropriate use, and on (2) which expansion, redevelopment, or reuse is

that are lightly contaminated."[23] However, "[s]uch a limited definition is . . . misleading."[24] A chief reason for abandonment or underutilization of brownfields is uncertainty regarding extent or existence of contamination.[25] Thus, the EPA definition is more complete; it suggests that complications to redevelopment abound not only in sites where actual contamination exists, but also in sites where contamination is *perceived* as well.

The degree of contamination at a brownfields site varies widely.[26] The majority of brownfields sites are only lightly contaminated, can be easily cleaned up, and offer viable opportunities for reuse.[27] Conversely, some brownfields are severely contaminated.[28] If a site investigation reveals substantial contamination, the site may be included on the National Priorities List ("NPL") under the Federal Comprehensive Environmental Response Compensation and Liability Act of 1980 ("CERCLA").[29] Properties on the NPL "demand monumental effort and resources to restore and manage."[30] If such sites are redeveloped, the cleanup is far more costly compared with other brownfields properties.[31] The NPL sites are true environmental nightmares, oftentimes bearing significant health and safety risks. Therefore, such sites are less likely to be redeveloped.[32] Distinguishing between these sites and sites with lower levels of contamination is paramount to understanding the brownfields problem because brownfields incentives often exclude properties on the NPL.[33]

> complicated; because of the presence or potential presence of a hazardous substance, a contaminant, petroleum, or a petroleum product that poses a risk to human health and the environment.

IND. CODE § 13-11-2-19.3 (2004).

23. William W. Buzbee, *Nature and Effects of the Brownfields Problem*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-4.

24. *Id.* (discussing how some "brownfields" definitions use the "only lightly contaminated" definition because many federal and state brownfields laws and voluntary cleanup initiatives target lightly contaminated sites and exclude severely contaminated sites).

25. *Id.*

26. *See* Faith R. Dylewski, Comment, *Ohio's Brownfield Problem and Possible Solutions: What is Required for a Successful Brownfield Initiative?*, 35 AKRON L. REV. 81, 85 (2001).

27. *See* William W. Buzbee, *Nature and Effects of the Brownfields Problem*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-4.

28. *See id.*

29. *See id.*; *see also* 42 U.S.C. §§ 9601-9675 (2000).

30. Todd S. Davis, *Defining the Brownfields Problem*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 6. The EPA has identified over 1250 NPL "sites that pose significant risks to human health and safety." *Id.*

31. *Id.*

32. *See* William W. Buzbee, *Nature and Effects of the Brownfields Problem*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-4.

33. Todd S. Davis, *Defining the Brownfields Problem*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 6.

B. The Extent of the Brownfields Problem

Thousands of brownfields sites exist around the United States.[34] However, the exact number is difficult to obtain. Varying definitions of brownfields, and the reality that many former industrial and commercial sites are yet to be thoroughly investigated for contaminants, leads to a wide range of figures.[35] By some estimates, more than 450,000 brownfields exist in the United States,[36] comprising five million acres of wasted land nationwide.[37] In terms of dollars and cents, "[c]urrent estimates place the cost of cleaning up the nation's brownfields at $650 billion."[38] Further, brownfields represent millions of dollars in lost tax revenue and wages.[39] According to a U.S. Conference of Mayors Report, "data suggests that more than 20,000 cities and other municipalities nationwide could be losing billions of dollars each year in local tax receipts resulting from their failure to restore brownfields to economic viability."[40]

Although the numbers reflect the sheer enormity of the brownfields dilemma, they do little to explain the sources of the problem. One commentator suggests the creation of the problem can be viewed in "two distinct stages."[41] First, "the initial decision to disinvest in such sites" occurred.[42] The initial decision to disinvest in what are now brownfields sites often originated decades ago as part of a "deindustrialization" trend in the United States.[43] This trend heavily impacted the Northeast and Midwest, leading to these geographic areas now containing the largest concentration of brownfields sites.[44] Secondly, the shift

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34. *See* William W. Buzbee, *Nature and Effects of the Brownfields Problem*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-4.

35. *Id.* at 1-5.

36. EPA, *Brownfields Cleanup and Redevelopment*, http://www.epa.gov/brownfields/about.htm (last visited Mar. 5, 2007); *see also* Todd S. Davis, *Defining the Brownfields Problem*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 6.

37. U.S. Dep't of Hous. & Urban Dev., *Brownfields Frequently Asked Questions*, http://www.hud.gov/offices/cpd/economicdevelopment/programs/bedi/bfieldsfaq.cfm (last visited Mar. 5, 2007).

38. Todd S. Davis, *Defining the Brownfields Problem*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 6.

39. CHARLES BARTSCH ET AL., NE.-MIDWEST INST., COMING CLEAN FOR ECONOMIC DEVELOPMENT: A RESOURCE BOOK ON ENVIRONMENTAL CLEANUP AND ECONOMIC DEVELOPMENT OPPORTUNITIES 1-2 (1996); Northeast-Midwest Inst., *Framework of Environmental and Economic Development Concerns*, http://www.nemw.org/cmclean1.htm (last visited Oct. 8, 2007).

40. Todd S. Davis, *Defining the Brownfields Problem*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 6.

41. William W. Buzbee, *Nature and Effects of the Brownfields Problem*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-6.1.

42. *Id.*

43. *Id.*

44. *See id.* at 1-6.1 to -7 (explaining how manufacturing operations from the predominately unionized jurisdictions of the Northeast and Midwest shifted to the South and Southwest as a result

from a primarily industrial economy to a service-oriented economy contributed to the problem.[45] Manufacturers increasingly moved operations abroad, particularly to Latin America and Asia.[46]

Brownfields include sites with many prior uses including: dry cleaners, factories, plants, and office buildings.[47] Brownfields can be as small as an abandoned "mom-and-pop" gas station on a one-acre plot or as expansive as a vacant steel-manufacturing campus sprawling out over several hundred acres.[48] Although the greatest concentration of brownfields properties are in inner cities, brownfields are also located in rural areas as well.[49] Left unchecked and underutilized, brownfields pose a plethora of burdens to the surrounding community.[50]

C. Effects of Undeveloped Brownfields Sites

The effects of undeveloped brownfields are "manifold."[51] Economic, social, and environmental problems represent the stigmatic impacts of brownfields on communities.[52] First, undeveloped brownfields can create hazards resulting from environmental contamination.[53] The potential harm to the ecology surrounding brownfields sites includes sustained environmental damage.[54] Inherent in the definition of brownfields is "either real or perceived . . . environmental contamination."[55] Accordingly, the associated contamination may be chemical, biological, or in remote instances, nuclear.[56] A property in this condition increases the loss of revenue due to real or perceived potential harm.[57]

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of lower wages and financial incentives).

45. *Id.* (noting that more than "[ninety] percent of new jobs created in the United States between 1974 and 1989 were . . . in the service sector").

46. *Id.*

47. Dylewski, *supra* note 26, at 85.

48. Todd S. Davis, *Defining the Brownfields Problem*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 5.

49. *See* William W. Buzbee, *Nature and Effects of the Brownfields Problem*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-5.

50. *Id.*

51. Todd S. Davis, *Defining the Brownfields Problem*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 7.

52. *See generally id.* at 3.

53. Kurt A. Frantzen & James N. Christman, *Cleanup Standards*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 22-1, 22-4.

54. *See id.*

55. *Id.* The authors define actual risk and perceived risk. *Id.* An actual risk is "the probability that the adverse effect will occur with a certain frequency and level of intensity." *Id.* A perceived risk is defined as "a mental construct defined by the hazard's importance and significance to individuals, the community, and society." *Id.*

56. *Id.*

57. *Id.*

Second, the potential harm to people includes "sickness or death."[58] Site contamination may pose a risk to those who work near a brownfields site.[59] Untreated contaminants located on the sites "may leech into the air and water."[60] Thus, abandoned brownfields sites create the potential for negative health consequences for the surrounding community.[61] Consequently, abandoned industrial sites are often blamed for a variety of adverse health problems "ranging from birth defects to cancer clusters."[62] Although a correlation between the location of brownfields and an increase in certain health problems may exist, oftentimes, the blame is placed before any investigation supports this assertion.[63] Nevertheless, the actual or perceived contribution to human illness from continual exposure to hazardous physical environments fuels the stigma.[64]

In addition to the potential environmental and associated health risks, brownfields also contribute to the area's economic and social problems.[65] "Potential investors, concerned about liability," avoid developing brownfields.[66]

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58. *See id.*

59. William W. Buzbee, *Nature and Effects of the Brownfields Problem*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-5.

60. *Id.*

61. Jennifer Felten, *Brownfield Redevelopment 1995-2005: An Environmental Justice Success Story?*, 40 REAL PROP. PROB. & TR. J. 679, 682 (2006).

62. *See* Kurt A. Frantzen & James N. Christman, *Cleanup Standards*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 22-1, 22-5.

63. *See id.*

64. *See* NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL WASTE AND FACILITY SITING SUBCOMMITTEE, ENVIRONMENTAL JUSTICE, URBAN REVITALIZATION, AND BROWNFIELDS: THE SEARCH FOR AUTHENTIC SIGNS OF HOPE, A REPORT ON THE "PUBLIC DIALOGUES ON URBAN REVITALIZATION AND BROWNFIELDS: ENVISIONING HEALTHY AND SUSTAINABLE COMMUNITIES" 18 (1996), *available at* http://www.epa.gov/Compliance/resources/publications/ej/public_dialogue_brownfields_1296.pdf.

65. *See generally* Todd S. Davis, *Defining the Brownfields Problem*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 6-7. In short, the

> cycle of decline . . . can be depicted as follows:
>
> 1. A property owner, unwilling or unable to sell contaminated property, mothballs it, thus undermining the local tax base.
> 2. Vacant facilities deteriorate and invite arson, illegal dumping, and vandalism, including the stripping of parts and materials.
> 3. Unaddressed contamination may spread, further eroding the property value, escalating the cleanup cost, and threatening the economic viability of adjoining properties.
> 4. Potential investors, faced with uncertain costs and legal liabilities, seek development opportunities elsewhere.
> 5. Brownfield sites become unwanted legal, regulatory, and financial burdens on the community and its taxpayers.

Id.

66. *Id.* at 7.

As a result, real estate investors are reluctant to invest in such properties.[67] Hence, the value of brownfields properties further diminishes in value.[68] Not only is the value of the brownfields sites diminished, the property can depress the value of surrounding property as well.[69] Further, a concentration of brownfields sites creates the perception that the site is somehow dangerous due to crime or contamination fears.[70]

Similarly, the community surrounding the brownfields suffers from the effects. The architectural eyesores and urban blight plague the communities where brownfields are situated.[71] The neighborhoods also suffer from a decreased tax base.[72] A decrease in property-tax collection leads to a decline in revenue available for urban schools and other public services.[73] Additionally, because brownfields provide no employment, the properties play a role in chronic unemployment.[74] Local government budgets are drained in areas of high unemployment, while contributing no long-term benefits.[75] High unemployment rates necessitate local government expenditures; yet, the community gleans no long-term benefits. The host of negative effects related to brownfields stems, in large part, from barriers to brownfields redevelopment.

D. Barriers to Brownfields Redevelopment

Although deindustrialization and associated demographic shifts supplied the initial impetus for brownfields creation, a litany of obstacles currently discourages progress.[76] Such obstacles to brownfields redevelopment include: "ambiguous legal liability, potentially substantial capital costs, insufficient financing, clouded environmental policies, [the] absence of a consistent redevelopment framework, public opposition, [and] a limited demand for redeveloped sites [due to] competition from greenfields."[77] Among the obstacles,

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67. *Id.*

68. *Id.*

69. Daniel A. Schenck, Note and Commentary, *The Next Step for Brownfields: Government Reinsurance of Environmental "Cleanup" Policies*, 10 CONN. INS. L.J. 401, 402 (2004).

70. William W. Buzbee, *Nature and Effects of the Brownfields Problem*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-6.

71. *See generally* Heidi Gorovitz Robertson, *One Piece of the Puzzle: Why State Brownfields Programs Can't Lure Businesses to the Urban Cores Without Finding the Missing Pieces*, 51 RUTGERS L. REV. 1075, 1079 (1999).

72. *Id.*

73. *Id.*

74. *See id.*

75. William W. Buzbee, *Nature and Effects of the Brownfields Problem*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-6.

76. *See* Todd S. Davis, *Defining the Brownfields Problem*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 3, 9.

77. Paul D. Flynn, Note, *Finding Environmental Justice Amidst Brownfield Redevelopment*, 19 VA. ENVTL. L.J. 463, 471 (2000).

the potential for crushing liability is a principal concern for developers contemplating whether to redevelop a brownfield.[78] Without regard to fault, environmental laws can impose liability on current and previous owners of contaminated properties.[79] Perhaps the most daunting environmental law affecting whether and how contaminated properties are cleaned and redeveloped is CERCLA.[80]

1. The Potential for CERCLA Liability is the Chief Statutory Disincentive to Brownfields Redevelopment.—In the late 1970s, Americans first began to recognize the threats buried toxic waste presented to human health and the environment.[81] The most infamous case to receive widespread public and government attention during this time occurred at a former landfill in Love Canal, New York.[82] At Love Canal, residents complained of health problems that were eventually attributed to exposure to toxic wastes buried in their community.[83] Ultimately, the exposure required the residents to abandon their homes.[84] By the end of the 1970s, thousands of abandoned sites considered to pose potential threats to human health and the environment generated pressure for governmental action.[85] "Although industrial waste-disposal practices were largely unregulated for nearly a century, once it became evident that federal government involvement was necessary, that federal presence came with a vengeance."[86]

Congress passed CERCLA[87] in 1980.[88] The hastily drafted compromise bill followed a lengthy legislative history.[89] Consequently, "the statute as enacted in 1980 was characterized by numerous ambiguities, omissions, and poorly drafted provisions, and the legislative history is of limited assistance in interpreting it."[90] The purpose of CERCLA is to identify and remediate chemical waste sites.[91] To

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78. Tara Burns Koch, Comment, *Betting on Brownfields—Does Florida's Brownfields Redevelopment Act Transform Liability into Opportunity?*, 28 STETSON L. REV. 171, 176 (1998).

79. *See id.* at 181.

80. *See generally* Donald S. Berry, *Principal Cause of Brownfields Problem—Superfund Liability*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 3-1, 3-1.

81. OFFICE OF SOLID WASTE & EMERGENCY RESPONSE, EPA, SUPERFUND: 20 YEARS OF PROTECTING HUMAN HEALTH AND THE ENVIRONMENT 2 (2000), *available at* http://www.epa.gov/superfund/20years/20yrptl.pdf.

82. *See id.* at 2-3.

83. *Id.* at 3.

84. *Id.*

85. Donald S. Berry, *Principal Cause of Brownfields Problem—Superfund Liability*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 3-1, 3-5.

86. Wendy E. Wagner, *Overview of Federal and State Law Governing Brownfields Cleanups*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 15, 15.

87. 42 U.S.C. §§ 9601-9675 (2000).

88. *See generally* Donald S. Berry, *Principal Cause of Brownfields Problem—Superfund Liability*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 3-1, 3-7.

89. *Id.*

90. *Id.*

91. *See* H.R. REP. NO. 96-1016, pt. 1, at 17 (1980), *as reprinted in* 1980 U.S.C.C.A.N. 6119,

this end, CERCLA authorized the imposition of taxes on certain industries involved in the creation of hazardous wastes to create a trust fund, known as the Superfund.[92] Superfund relied on potentially responsible parties reimbursing it for the costs of government-led cleanup.[93] In fact, lawsuits to establish liability, and the subsequent imposition of financial responsibility, became the "principal funding strategy" for the Superfund.[94] CERCLA's broad liability scheme imposes the cleanup cost on the party responsible for the hazardous waste disposal.[95]

The interpretation of the "party responsible" includes a broad range of potential parties.[96] CERCLA's broad liability scheme encompasses several key elements in imposing responsibility. First, CERCLA liability requires the contaminated site to qualify as a "facility."[97] The broad scope of "facility" includes virtually any area contaminated with hazardous wastes.[98] It includes not only buildings and other structures, but also "any . . . area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."[99]

The second element to establish liability under CERCLA requires that the

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6119 (stating that CERCLA's purpose is "to provide for a national inventory of inactive hazardous waste sites and to establish a program for appropriate environmental response action to protect public health and the environment from the dangers posed by such sites").

92. Wendy E. Wagner, *Overview of Federal and State Law Governing Brownfields Cleanups*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 15, 16-17.

93. 42 U.S.C. § 9607 (2000). CERCLA recognized four categories of potentially responsible parties including: current owners and operators of a facility where hazardous material is released, owners and operators at the time of a hazardous material was put there, persons or the entities who arranged for the treatment or disposal of the hazardous material, and the persons or entities that selected the facilities for the disposal of hazardous waste or any persons and entities that transported hazardous material to or from the facility. *See id.*

94. James A. Kushner, *Brownfield Redevelopment Strategies in the United States*, 22 GA. ST. U. L. REV. 857, 867 (2006).

95. OHM Remediation Servs. v. Evans Cooperage Co., 116 F.3d 1574, 1578 (5th Cir. 1997).

96. Donald S. Berry, *Principal Cause of Brownfields Problem—Superfund Liability*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 3-1, 3-4 ("These liability provisions have been interpreted to apply to a broad range of parties that are considered to fall within the 'owner or operator' or 'arranger' category but have not caused or contributed to contamination of the properties requiring cleanup. These parties include owners and operators who acquired contaminated property after the contamination occurred, lenders holding security interests in such properties, and companies and individuals related in various ways to the property owners or operators, or to the generators of the contaminants at such properties.").

97. Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 668 (5th Cir. 1989).

98. *See* 42 U.S.C. § 9601(9)(B) (2000).

99. *Id.*; *see also* United States v. Ne. Pharm. & Chem. Co., 810 F.2d 726, 743 (8th Cir. 1986) (quoting United States v. Ward, 618 F. Supp. 884, 895 (E.D.N.C. 1985)) (stating that facility should be defined broadly to include almost anywhere that hazardous waste has been placed or is located).

defendant is established as a "potentially responsible party" ("PRP").[100] A PRP includes a wide range of entities involved with a hazardous waste site.[101] A PRP includes any entity which arranged for disposal or treatment of the hazardous substances at the facility and any entity that transported the substances to a facility.[102]

Additionally, CERCLA imposes strict liability on any PRP for any release or threatened release of a hazardous substance.[103] The statute makes no provision for the minimum volume requirement of release in order to sustain a cause of action.[104] Finally, CERCLA liability requires that the plaintiff incur response costs resulting from the release or threatened release of hazardous substances, and it also imposes joint and several liability on any PRP.[105]

Under CERCLA, anyone in the chain of title for a contaminated site may have liability.[106] Thus, "[l]iability is based on the status of ownership[,] rather than" culpability or causation.[107] Consequently, potential developers and lenders are often discouraged "from becoming involved with ownership, cleanup, development, and use of brownfields sites."[108] "Although designed to expedite [the] cleanup of past environmental" hazards and eliminate future hazards, "CERCLA unintentionally deters brownfield redevelopment" because it exposes property owners to cleanup liability.[109]

2. Additional Barriers Hinder Brownfields Redevelopment.—Along with the liability issues associated with contaminated properties from CERCLA, non-environmental factors also play a role in deciding whether to redevelop a brownfield property.[110] "For example, location and future profitability of a proposed . . . project may [deter redevelopment] for reasons unrelated to environmental liability."[111] One typical concern of this nature facing developers

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100. *See Amoco Oil Co.*, 889 F.2d at 668.

101. 42 U.S.C. § 9607(a) (2000).

102. *Id.*

103. *Amoco Oil Co.*, 889 F.2d at 670 n.8. A release is defined as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)." *Id.* at 669 (quoting 42 U.S.C. § 9601(22) (1983 & Supp. 1989)).

104. *Id.*

105. *Id.* at 672.

106. *See generally* Hope Whitney, *Cities and Superfund: Encouraging Brownfield Redevelopment*, 30 ECOLOGY L.Q. 59, 72-84 (2003).

107. Kushner, *supra* note 94, at 868.

108. Donald S. Berry, *Principal Cause of Brownfields Problem—Superfund Liability*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 3-1, 3-4.

109. Flynn, *supra* note 77, at 472.

110. William W. Buzbee, *A Roadmap to the Brownfields Transition—Perspectives and Goals of the Parties*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 2-1, 2-4.1.

111. *Id.*

is whether a site is located "in an area suffering from widespread . . . blight."[112] In blighted areas, even lightly contaminated properties may prove too risky to redevelop.[113]

E. Positive Attributes of Brownfields Redevelopment

Though brownfields present challenges to both developers and the communities where situated, they offer important opportunities as well. Scarcity of centrally located urban land may be the most important factor to encourage brownfields redevelopment.[114] Therefore, brownfields offer desirable locations for industrial, commercial, or other uses, which attract developers and investors.[115] In many cases, "infrastructure systems and energy sources are readily available."[116] They are often located near public transportation and near restaurants, shopping, and other amenities.[117] Further, costs to a developer may be lowered by using an existing building.[118] In short, brownfields properties can be purchased in prime locations for substantially less than similarly situated, uncontaminated properties.[119]

For communities, numerous benefits follow brownfields redevelopment. Redevelopment of brownfields properties often results in bringing new businesses, jobs, and an improved tax base to areas where the quality of life had been dwindling.[120] According to the EPA, "[b]rownfields revitalization provides communities with the tools to reduce environmental and health risks, reuse abandoned properties, take advantage of existing infrastructure, create a robust tax base, attract new businesses and jobs, create new recreational areas, and reduce the pressure to develop open spaces."[121] Brownfields redevelopment also helps to reduce blight and eliminate eyesores.[122] Accordingly, federal and state brownfields programs promoting cleanup of contaminated properties facilitate

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112. *Id.*

113. *Id.*

114. Deborah A. Sivas, *Nature and Effects of the Brownfields Problem*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-19.

115. IND. FIN. AUTH., BROWNFIELDS BASICS 1 (2006), http://www.in.gov/ifa/brownfields/BrownfieldsBasics.pdf.

116. *Id.*

117. *See generally* Whitney, *supra* note 106, at 65.

118. IND. FIN. AUTH., INDIANA BROWNFIELDS REDEVELOPMENT RESOURCE GUIDE 7 (2003), *available at* http://www.in.gov/ifa/brownfields/pdffiles/guidance/resourceguide.pdf [hereinafter IND. FIN. AUTH., RESOURCE GUIDE].

119. *See generally* William W. Buzbee, *Nature and Effects of the Brownfields Problem*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 1-1, 1-7.

120. IND. FIN. AUTH., RESOURCE GUIDE, *supra* note 118, at 7.

121. EPA, THE NEW BROWNFIELDS LAW 1 (2002), *available at* http://www.epa.gov/brownfields/pdf/bflawbrochure.pdf.

122. *See* IND. FIN. AUTH., RESOURCE GUIDE, *supra* note 118, at 7.

growth and revitalization in these areas.[123]

II. ENVIRONMENTAL JUSTICE AND BROWNFIELDS REDEVELOPMENT

First, Part II provides an overview of environmental justice; it defines environmental justice and explores the history of the movement. Then, this Part explains the connection between environmental justice and brownfields redevelopment.

A. Environmental Justice Overview

Through the years, no universally accepted definition of environmental justice emerged.[124] In fact, some have called the term "maddeningly vague."[125] However, the EPA defines environmental justice as, "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[126] According to the EPA, the ultimate goal of the environmental justice movement is to create a society where, "everyone enjoys the same degree of protection from environmental and health hazards and equal access to the decision-making process to have a healthy environment in which to live, learn, and work."[127] A chief aim of environmental justice is to create a society where no group disproportionately suffers.[128] To this end, achieving environmental justice for all populations requires calling attention to the perceived injustices and finding ways to rectify them.[129]

What became known as the "environmental justice" issue has its roots in the civil rights movement of the 1960s.[130] Decades later, "localized, grassroots uprisings against the sitings of landfills and other polluting industries" brought the issue into the national spotlight.[131] These uprisings "evolved into a national

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123. *See* Felten, *supra* note 61, at 681.

124. Eileen G. Jones, *Environmental Justice in the New Millennium*, http://www.agecon.lsu.edu/ESOS-V%20Proceedings/pdf/Jones.pdf (last visited Mar. 5, 2007).

125. Flynn, *supra* note 77, at 468 (citing CHRISTOPHER H. FOREMAN, JR., THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE 122 (1998)).

126. EPA, *Environmental Justice*, http://www.epa.gov/compliance/environmentaljustice/index.html (last visited Mar. 5, 2007).

127. *Id.*

128. *See* John C. Chambers, *Community Participation in Brownfield Redevelopment*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 243, 247.

129. *Id.*

130. *See* Carolyn Graham & Jennifer B. Grills, Comment, *Environmental Justice: A Survey of Federal and State Responses*, 8 VILL. ENVTL. L.J. 237, 238-41 (1997).

131. Flynn, *supra* note 77, at 468; *see also* Rachel Paras, Note, *Relief at the End of a Winding Road: Using the Third Party Beneficiary Rule and Alternative Avenues to Achieve Environmental Justice*, 77 ST. JOHN'S L. REV. 157, 160 (2003). Commentators credit the 1982 uprising in Warren County, North Carolina as the impetus for the development of the environmental justice movement. *Id.* Residents of a small, predominately African-American community organized to demonstrate

campaign" as community movements became bolstered by studies.[132] The studies suggested that the anecdotal evidence of disproportionate exposure may be representative of actual statistical phenomena.[133] The studies revealed that low-income and minority communities are faced with higher rates of exposure to toxics than the general public.[134] Moreover, the same communities "are also most likely to bear the environmental brunt of our collective waste production, as well as spills and faulty cleanup at waste and other industrial sites."[135]

The 1987 report, *Toxic Wastes and Race in the United States*, published by the United Church of Christ, is largely regarded as the seminal work in the environmental justice movement.[136] This influential report began the process of documenting the "race and income disparities in pollution exposure."[137] Specifically, "[t]he study found that three out of five African Americans and Hispanic Americans were living in communities with uncontrolled toxic waste sites."[138] The EPA reviewed the research and found that "racial minority and low income populations experience higher than average exposures to certain air pollutants, hazardous waste facilities (and by implication, hazardous waste), contaminated fish, and agricultural pesticides."[139]

Achieving environmental justice involves minority and low-income individuals, communities, and populations playing a direct, meaningful role in decision making processes affecting their environment.[140] In fact, the EPA's Brownfields Mission espouses the notion that community involvement is a key component to effective brownfields redevelopment.[141] Additionally, the administrators of Indiana's brownfields programs acknowledge that environmental injustices must be exposed and addressed by all parties involved in the redevelopment of brownfields.[142]

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against the siting of a landfill to be utilized for the disposal of soils contaminated with PCBs. *Id.* These protests garnered national attention. *Id.* As a result of the protests the United States General Accounting Office ("GAO") performed a study concerning the location of hazardous landfills in eight southern states. *Id.* at 160-61. The GAO findings confirmed that 75% of the landfills were located in or near minority communities. *Id.*

132. Flynn, *supra* note 77, at 468.

133. *Id.*

134. Uma Outka, Comment, *Environmental Injustice and the Problem of the Law*, 57 ME. L. REV. 209, 211 (2005).

135. *Id.*

136. *Id.* at 212.

137. *Id.*

138. *See* SINGER ET AL., *supra* note 17, at 7.

139. Outka, *supra* note 134, at 213.

140. *See* Michael B. Gerrard, *Environmental Justice and Local Land Use Decisionmaking*, *in* TRENDS IN LAND USE LAW FROM A to Z: ADULT USES TO ZONING 125, 126 (Patricia E. Salkin ed., 2001) [hereinafter TRENDS IN LAND USE LAW].

141. *See* EPA, *Brownfields Mission*, http://www.epa.gov/brownfields/ mission.htm (last visited Mar. 5, 2007).

142. IND. FIN. AUTH., RESOURCE GUIDE, *supra* note 118, at 16.

B. The Intersection of Brownfields and Environmental Justice

Conditions creating brownfields and environmental justice concerns have similar origins.[143] The realities creating conditions suitable for brownfields are also the same conditions that raise environmental justice concerns.[144] Further, both brownfields redevelopment and environmental justice are closely associated because each targets the redevelopment of properties in communities that are traditionally underserved.[145]

The connection between the brownfields problem and environmental justice concerns stems from a number of social, economic, and environmental factors.[146] Policies that foreclose certain groups from participating in the decision-making process have contributed to environmental justice concerns and the creation of brownfields.[147] Thus, brownfields are inextricably linked to "issues of social inequity, racial discrimination and urban decay—specifically manifested in adverse land use decisions, housing discrimination, residential segregation, community disinvestment, infrastructure decay, lack of educational and employment opportunity, and other issues."[148]

In any brownfields redevelopment project a variety of stakeholders must consider their own set of risks.[149] Investors, developers, or owners who redevelop brownfields and the communities where the redevelopment occurs often have diverging goals.[150] The objective of the potential property owner is to realize profits.[151] On the other hand, a primary concern of the communities targeted for the redevelopment is a safe, economically-viable living environment.[152] The conflicting goals could lead stakeholders concerned with profits to make decisions to achieve their goal at the expense of poor, minority, and otherwise marginalized communities.[153] Therefore, environmental justice concerns meet brownfields redevelopment projects in an intimate way.

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143. *See* SINGER ET AL. *supra* note 17, at 8.

144. *See id.*

145. *See id.*

146. *See id.* at 5.

147. *See id.*

148. NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL WASTE AND FACILITY SITING SUBCOMMITTEE, *supra* note 64, at es-ii.

149. William W. Buzbee, *A Roadmap to the Brownfields Transition—Perspectives and Goals of the Parties*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 2-1, 2-4.1. Stakeholders, in this context, "are individuals or groups that stand to gain or lose resources through the resolution of an environmental justice or brownfields issue." SINGER ET AL., *supra* note 17, at 6.

150. *See generally* William W. Buzbee, *A Roadmap to the Brownfields Transition—Perspectives and Goals of the Parties*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 2-1, 2-4.1.

151. *See* Flynn, *supra* note 77, at 475.

152. *See id.*

153. *See* Felten, *supra* note 61, at 681.

III. THE LAW

Part III focuses specifically on current laws impacting brownfields. First, this Part explains major federal brownfields legislation. Then, this Part highlights the typical components of a state brownfields program.

A. Small Business Liability Relief and Brownfields Revitalization Act

The brownfields problem first attracted attention from the public and private sector in the mid-1980s.[154] About a decade later, the EPA and state agencies began applying new policies and approaches to encourage brownfields restoration.[155] The need to eliminate the barriers to brownfields redevelopment became one of Congress's major agenda items.[156] Between 1994 and 2001, Congress attempted to pass legislation relating to brownfields; however, the legislators did not enact a single bill.[157] Then, on January 11, 2002, President Bush amended CERCLA when he signed the Small Business Liability Relief and Brownfields Revitalization Act (the "Act") into law.[158]

The purpose of the Act is "[t]o provide certain relief for small businesses from liability under [CERCLA] and . . . to promote the cleanup and reuse of brownfields, to provide financial assistance for brownfields revitalization, [and] to enhance State response programs."[159] The Act "expands the EPA's Brownfield Program,"[160] and clarifies the standard for appropriate inquiries by innocent landowners.[161] Additionally, the Act provides some protection for potential purchasers and contiguous property owners.[162] Essentially, the primary objective of the "statutory revisions is to facilitate brownfields redevelopment."[163]

The Act facilitates brownfields redevelopment primarily through two

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154. Schenck, *supra* note 69, at 402.

155. IND. FIN. AUTH., BROWNFIELD BASICS, *supra* note 115, at 1.

156. Wendy E. Wagner, *Overview of Federal and State Law Governing Brownfields Cleanups*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 15, 27.

157. David B. Hird, *The Brownfields Revitalization and Environmental Restoration Act*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at xxxv, xxxv.

158. *See* Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

159. *Id.*

160. EPA, THE NEW BROWNFIELDS LAW 1 (2002), *available at* http://www.epa.gov/brownfields/pdf/bflawbrochure.pdf; *see also* Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002).

161. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002); EPA, THE NEW BROWNFIELDS LAW, *supra* note 160, at 2.

162. 42 U.S.C. §§ 9601(35), 9601(40) (bona fide prospective purchaser defense), 9607(b)(3) (innocent landowner defense), 9607(q) (contiguous property owner defense) (2000 & Supp. I 2001).

163. Donald S. Berry, *Principal Cause of Brownfields Problem—Superfund Liability*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 3-1, 3-11.

mechanisms.[164] First, the Act provides $200 million per fiscal year to provide grants to state and local governments for brownfields site characterization and remediation.[165] Second, the Act provides liability relief for persons, as defined by CERCLA, who are members of a state voluntary cleanup program.[166] Thus, the federal brownfields legislation created a federal enforcement bar, which in most cases, provides liability relief for sites cleaned up under a state program.[167] The most ubiquitous state brownfields initiative is the voluntary cleanup program.

B. The Anatomy of a State Brownfields Program

State legislatures fashioned the most successful responses to the adverse impacts of CERCLA on brownfields redevelopment;[168] individual states developed their own "brownfield[s] programs and volunteer clean up initiatives."[169] In fact, before Congress passed brownfields-specific reforms in 2001, successful legislation relating to brownfields restoration emerged solely at the state level.[170] Since the inception of brownfields redevelopment programs, forty-seven states have implemented some type of brownfields initiative.[171]

Two reasons may explain why the state efforts prove more successful than the federal programs.[172] First, most contaminated properties fall under state jurisdiction; the EPA focuses on NPL sites which constitute only a small percentage of brownfields.[173] Second, state programs are more willing to allow some residual contamination on-site following cleanup, but the EPA offers less flexible cleanup standards.[174] As a result, state programs lend themselves to a more efficient pace for redevelopment.[175]

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164. William T.D. Freeland, Note, *Environmental Justice and the Brownfields Revitalization Act of 2001: Brownfields of Dreams or a Nightmare in the Making*, 8 J. GENDER RACE & JUST. 183, 186-87 (2004).

165. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, § 211(b)12(A), 115 Stat. 2356, 2368 (2002).

166. Freeland, *supra* note 164, at 186 (explaining that, "the federal government will not commence an action to hold that 'person' responsible as a potentially liable party under section 107(a) of CERCLA").

167. NATIONAL BROWNFIELD ASSOCIATION, *supra* note 13, at 1.

168. Wendy E. Wagner, *Overview of Federal and State Law Governing Brownfields Cleanups*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 15, 27.

169. Schenck, *supra* note 69, at 412.

170. *See* David B. Hird, *The Brownfields Revitalization and Environmental Restoration Act*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at xxxv, xxxv.

171. Kurt A. Frantzen & James N. Christman, *Cleanup Standards*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 22-1, 22-11.

172. Andrea Ruiz-Esquide, Comment, *The Uniform Environmental Covenants Act—An Environmental Justice Perspective*, 31 ECOLOGY L.Q. 1007, 1013 (2004).

173. *Id.*

174. *Id.*

175. *Id.*

Although each state brownfields program is unique, several key elements define a "typical" state voluntary cleanup program ("VCP").[176] Elements common to most VCPs are as follows:

> First, all the programs are voluntary and do not require property owners to join. Second, most states prohibit voluntary cleanup of federal NPL sites, thus emphasizing the cleanup of smaller, less contaminated sites. Third, state voluntary action statutes and programs generally streamline the cleanup approval process. Fourth, states usually establish cleanup standards that permit higher levels of contamination risk relative to the Superfund program when a site will be used for commercial or industrial rather than residential purposes. Finally, voluntary action statutes and programs typically limit a developer's liability against state enforcement. . . .[177]

Based on the common VCP elements, "three advantages [to] participants interested in purchasing a brownfields site" emerge. These advantages include (1) "streamlined administrative procedures," which reduce cost, (2) "relaxed cleanup standards," and (3) "liability protection."[178] The use of VCPs is one of the hallmarks distinguishing brownfields sites.[179]

In addition to the aforementioned common elements of a VCP, many state brownfields programs have public participation requirements. Public participation requirements in state brownfields programs come in many forms.[180] A typical notice statute requires the developer to notify the state environmental agency for approval of the plan, publish a "notice in a local newspaper of general circulation," and "provide a copy of its plan to the local government[]."[181] A small minority of states require the developer to give direct notice to contiguous property owners via mail.[182] Other states, like Indiana, provide for a notice and

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176. *See generally id.* at 1013-14.

177. *Id.* (footnotes omitted).

178. Kurt A. Frantzen & James N. Christman, *Cleanup Standards*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 22-1, 22-13 to -14. Tools employed to limit a developer's liability include: "no further action letters," "covenants not to sue," "releases from state CERCLA liability," and "certificates of completion." Ruiz-Esquide, *supra* note 172, at 1014 (explaining that "no further action" letters indicate that a state probably will not pursue further enforcement based on current information about the site, covenants not to sue provide express protection from state enforcement actions, and certificates of completion indicate that a cleanup meets applicable standards).

179. Kurt A. Frantzen & James N. Christman, *Cleanup Standards*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 22-1, 22-13.

180. *See* Joel B. Eisen, *"Brownfields of Dreams"?: Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883, 972-77.

181. *See* Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-17.

182. *Id.*

comment period, "usually between [fourteen] and [thirty] days."[183] "In many states with a public comment period, the lead state environmental agency must consider" the comments and revise the remediation proposal if a comment raises significant concern.[184] No state, however, requires rejection of proposed plans if significant opposition results.[185] On the other hand, several states mandate no public participation requirements at all in brownfields development projects.[186] Although the requirements vary, they demonstrate at least some concern for environmental justice considerations in the administration of the state brownfields programs.

IV. INDIANA'S BROWNFIELDS PROGRAMS

Part IV discusses Indiana's brownfields initiatives. First, this Part provides information about the Voluntary Remediation Program, including the history, purpose, and eligibility for the program. Then, this Part discusses the Indiana Brownfields Program, Indiana's program to encourage brownfields redevelopment by providing financial incentives.

A. Voluntary Remediation Program

Indiana, like many Midwestern and Northeastern states experiencing a decline in the manufacturing industry, has a brownfields problem. In response, Indiana created a brownfields program.[187] In 1993, "Indiana was among the first states to address the liability issues associated with" brownfields redevelopment.[188] Pursuant to the Voluntary Remediation of Hazardous Substances and Petroleum Act,[189] the Indiana Department of Environmental Management ("IDEM") established the Voluntary Remediation Program ("VRP").[190] To date, over 500 properties are either active VRP sites or have completed cleanups through the program.[191]

The VRP provides a mechanism where property owners or operators voluntarily enter an agreement with IDEM to cleanup a contaminated property.[192]

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183. *See id.*; *see also, e.g.*, IND. CODE § 13-25-5-11 (2004).

184. *See* Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-17 to -18; *see also, e.g.*, IND. CODE § 13-25-5-11(c) (2004).

185. *See* Eisen, *supra* note 180, at 975-76.

186. *See* Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-21.

187. *See* IND. CODE § 13-25-5-1 (2004); *see also* IND. FIN. AUTH., BROWNFIELDS BASICS, *supra* note 115, at 2.

188. IND. FIN. AUTH., BROWNFIELDS BASICS, *supra* note 115, at 2.

189. IND. CODE § 13-25-5-1 (2004).

190. *Id.*

191. Ind. Fin. Auth., *Indiana Brownfields Program*, http://www.in.gov/ifa/brownfields/ (last visited Mar. 5, 2007).

192. *See* IND. CODE § 13-25-5-1 (2004).

Almost any site is potentially eligible for the program.[193] Once a party enters the VRP by submitting a fee and receiving approval of the Remedial Work Plan, remediation work begins.[194] Additionally, public involvement is an essential component of the VRP; the Remedial Work Plan is subject to a 30-day public notice and comment period.[195]

In response to potential liability, which is often cited as the most daunting impediment to brownfields redevelopment,[196] the VRP offers liability protection at the successful conclusion of a project.[197] After cleanup, IDEM offers liability protection by issuing a "Certificate of Completion," and the Governor's office will issue a "Covenant Not to Sue" to the cleaned up property.[198] These documents provide assurance that the remediated areas will not become subject to a future IDEM enforcement action.[199] Moreover, IDEM has signed a Memorandum of Agreement ("MOA") with the EPA pertaining to Indiana's VRP.[200] The MOA provides that when IDEM issues a Certificate of Completion for the site, the EPA will not pursue action under CERCLA.[201]

Thus far, the flexibility of Indiana's VRP is its greatest asset.[202] A site owner may decide when or *if* it will enter the program, and may decide to deal selectively with concerns at a site.[203] An owner or operator may choose, for example, to remediate only those sites he or she used.[204] Furthermore, IDEM's program also allows participants flexibility in developing remedial solutions.[205] The VRP benefits owners, developers, and real estate purchases because it

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193. *See id.* § 13-25-5-5. An application may be rejected if (1) a pending state or federal enforcement action concerning the proposed cleanup exists; or (2) a federal grant compels IDEM to take enforcement action; or (3) conditions at the site pose a substantial and imminent threat to human health. *Id.*

194. *See id.* § 13-25-5-13.

195. *Id.* § 13-25-5-11; *see infra* Part V.A.

196. *See supra* Part I.A.

197. *See* IND. CODE § 13-25-5-18 (2004). The cleanup criteria for sites within the VRP are based on quantitative standards. *See id.* § 13-25-5-8.5. The remediation objective must be based on either background levels or an assessment of the risks posed by the contamination. *Id.*

198. *Id.* § 13-25-5-18.

199. *See id.*

200. *See* Ann Slaughter Andrew & Sharon A. Hilmes, *Indiana*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 578, 579.

201. *Id.* The EPA will only consider a CERCLA action in exceptional circumstances if "the site poses an imminent and substantial threat to human health or the environment." *Id.* Also, the MOA does not apply to properties listed on the NPL or sites currently under enforcement actions under CERCLA. *Id.*

202. *See* Lewis Beckwith, *Indiana*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at IN-1, IN-2.

203. *Id.*

204. *Id.*

205. *See id.*

provides a flexible solution for liability protection.[206] At the same time, the VRP benefits the environment and the public through identification and cleanup of contaminated properties.

B. Financing Programs

In 1997, Indiana passed legislation creating a brownfields program.[207] The program encouraged municipalities to convert brownfields to productive uses by providing financial incentives.[208] In many instances, costly procedures must occur in order to embark on a brownfields redevelopment project.[209] Passed in 2005, Indiana's current brownfields financial assistance legislation created the Indiana Brownfields Program ("Program").[210] The Program represents a change from the original form. The ultimate goal, however, remains the same: to "[r]ecycle a property with existing infrastructure and buildings back into the community as a viable and competitive commercial, industrial, retail or public property."[211]

Pursuant to Indiana Code section 13-19-5-2, the Indiana Brownfields Program is established as a revolving loan program.[212] The Program merged the financial and environmental technical review components under the umbrella of the Indiana Finance Authority ("IFA").[213] Under the IFA, the Program "offers educational, financial, technical and legal assistance to eligible entities involved in brownfields redevelopment."[214] The Program provides grants, loans, forgivable loans, or other financial assistance to political subdivisions.[215] Projects that have community support and for which there is a demonstrated need receive preference under the Program through the use of a priority ranking system.[216]

V. ANALYSIS OF THE ENVIRONMENTAL JUSTICE CONSIDERATIONS IN INDIANA'S BROWNFIELDS PROGRAMS

Part V provides an analysis of the environmental justice considerations in the

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206. *See generally id.*

207. *See* Ann Slaughter Andrew & Sharon A. Hilmes, *Indiana*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 578, 580.

208. CHARLES BARTSCH & RACHEL DEANE, BROWNFIELDS STATE OF THE STATES: AN END-OF-SESSION REVIEW OF INITIATIVES AND PROGRAM IMPACTS IN THE 50 STATES 29 (2002), http://www.nemw.org/brown_stateof.pdf.

209. *See* Koch, *supra* note 78, at 183.

210. *See* IND. CODE § 13-19-5-2 (Supp. 2007).

211. IND. FIN. AUTH., RESOURCE GUIDE, *supra* note 118, at 12.

212. IND. CODE § 13-19-5-2 (Supp. 2007).

213. IND. FIN. AUTH., BROWNFIELDS BULLETIN SPECIAL EDITION: NEW INDIANA BROWNFIELDS PROGRAM OFFERS NEW AND IMPROVED FINANCIAL INCENTIVES 1 (2006), http://www.in.gov/ifa/brownfields/bulletinspecialedition.pdf.

214. Ind. Fin. Auth., *Indiana Brownfields Program*, *supra* note 191.

215. IND. CODE § 13-19-5-2 (Supp. 2007).

216. *See id.* § 13-19-5-8; *see also infra* Part VI.B.1-2.

VRP and the Indiana Brownfields Program. First, environmental justice considerations are analyzed for the VRP. Next, environmental justice considerations are analyzed for the Indiana Brownfields Program. Specifically, the Indiana Brownfields Program section provides an analysis of guidelines for the Assessment Grants and the Low-Interest Loan program. Finally, this Part concludes that though Indiana's brownfields programs incorporate elements of environmental justice, they do not go as far as they might to advance the goals.

A. The Voluntary Remediation Program

The Voluntary Remediation Act requires the opportunity for public input before IDEM approves or rejects a remediation proposal.[217] Though not explicitly stated as such, Indiana's VRP allows for environmental justice considerations through a public comment period.[218] In fact, IDEM regards public involvement as an essential component of the VRP.[219] Specifically, the statute requires a plan for "[c]ommunity relations and community comment in planning, cleanup objectives, and implementation processes."[220]

To provide additional guidance for the community relations plan requirement, IDEM adopted a nonrule policy. The plan seeks to ensure that affected parties are informed of the VRP's site remediation activities prior to their completion. Notwithstanding the non-binding nature of the guidance, the basic components of the VRP community relations plan take a proactive approach. However, the community relations plan document is intended solely for guidance and does not have the effect of law or an IDEM final action.

Additionally, the VRP requires that sites in the program are subject to a thirty-day public notice and comment period.[221] During this notice and comment period, IDEM will place a copy of the site's remediation plan in a local repository and invite interested parties to comment.[222] IDEM *may* also hold a public hearing if at least one request is received during the period.[223] Thus, holding a public hearing is completely discretionary; providing a forum for public testimony is not required. Although the IDEM commissioner is required to consider all comments and written testimony, the Act does not require that IDEM prepare any response to the comments upon approving a plan.[224]

The requirements listed above reveal that the VRP does not explicitly require consideration of environmental justice in its statutory language. Nevertheless, the program does incorporate environmental justice concerns. The VRP requires a

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217. *See* IND. CODE § 13-25-5-11 (2004).

218. *See id.*

219. IND. DEP'T OF ENVTL. MGMT., VOLUNTARY REMEDIATION PROGRAM 5, http://www.in.gov/idem/catalog/documents/land/vrpbooklet.pdf.

220. IND. CODE § 13-25-5-7 (2004).

221. *Id.* § 13-25-5-11.

222. *Id.*

223. *Id.*

224. *See id.*

public participation process.[225] The statutory requirements for the public notice and comment period does not, however, amount to substantive community participation. "The traditional view that community participation is satisfied by a mere opportunity to review and comment . . . is defunct."[226] Therefore, this skeletal requirement for notice and comment underscores the lack of more substantive requirements for community support. Unfortunately, it is difficult to stipulate what specific standards would be most effective to ensure public participation through a substantive requirement. However, merely including the minimal requirement in the statute without more substantive requirements should be the starting point, not the final requirement.

As previously mentioned, environmental justice seeks to call attention to perceived environmental injustices and find ways to rectify them. Further, achieving environmental justice requires that communities live in clean, healthy, and sustainable communities. Thus, returning brownfields to productive uses can help to reach this goal. Once a party is confident that liability concerns are addressed prior to remediation, developers subsequently perform the remediation or sell the property. Following the redevelopment, an environmental hazard is removed, and the community is healthier for it. Additionally, aesthetic improvement and heightened community morale follow redevelopment.

The administration of Indiana's VRP tangentially takes environmental justice considerations to heart; it encourages brownfields redevelopment in communities where environmental justice is a concern. However, strengthening the level of community participation would acknowledge that community involvement in brownfields redevelopment is worth pursuing to more fully address environmental justice goals. A notice and comment period after the submission of a remediation plan is of little consequence. Such a participation requirement does not allow the community to have an ongoing or even an influential role in the decision-making process that directly affects their living environment.

B. The Indiana Brownfields Program

Similar to the VRP, the Indiana Brownfields Program ("Program") seeks to facilitate brownfields redevelopment.[227] The "Program offers financial assistance in the forms of grants and low-interest loans."[228] This financial assistance is offered to help with "site assessment, remediation, and demolition."[229] Additionally, Indiana matches grants for those sites receiving brownfields funding from the EPA and offers tax incentives at qualified brownfields sites.[230]

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225. *See id.*

226. John C. Chambers, *Community Participation in Brownfields Redevelopment*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 243, 251.

227. *See* IND. CODE § 13-19-5-1 (Supp. 2007).

228. Ind. Fin. Auth., *Financial Assistance*, http://www.in.gov/ifa/brownfields/financial_assistance.htm (last visited Feb. 26, 2007).

229. *Id.*

230. *Id.*

Stipulated Assessment Grants, Stipulated Remediation Grants, and Brownfields Low-Interest Loans are among the principal financing programs offered by the Indiana Brownfields Program.[231] Each program contains guidelines that are used to evaluate grant applicants.

1. The Stipulated Site Assessment Grant Provides for Environmental Justice Considerations.—The Stipulated Assessment Grants ("Assessment Grants") allow Indiana political subdivisions to apply for funds from the Indiana Brownfields Program to finance environmental site assessment costs for a brownfield within its jurisdiction.[232] The application sets forth the criteria used to rank each applicant.[233] Then, based on the criteria, the Assessment Grants are awarded to the highest ranking applicants.[234]

Like the Brownfields Revitalization Act, which has mechanisms in place to ensure that the $200 million distributed by the EPA is congruent with the tenants of environmental justice,[235] so too does the Assessment Grant.[236] The Brownfields Revitalization Act requires the EPA use a ranking to determine which sites receive funding.[237] The criteria includes, "[t]he extent to which a grant would address or facilitate the identification and reduction of threats to the health or welfare of children, pregnant women, minority or low-income communities, or other sensitive populations."[238] The EPA has additional criteria for selecting grant recipients, including the inability of the community to find other funding and the potential for stimulation of economic development in the area.[239]

Similarly, the Indiana Brownfields Program outlines the criteria used for selecting recipients for the Assessment Grants.[240] The stipulations include requiring that applicants demonstrate a certain level of investment in their sites within a two-year period following the grant.[241] The level of investment is based on the applicant's population and median household income.[242] Additionally,

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231. *Id.*

232. IND. FIN. AUTH., INDIANA BROWNFIELDS PROGRAM, STIPULATED REMEDIATION GRANT GUIDELINES 1 (2007), http://www.in.gov/ifa/brownfields/pdffiles/SAGGuides0307.pdf [hereinafter IND. FIN. AUTH., REMEDIATION GRANT GUIDELINES].

233. *Id.* at 4-6.

234. *Id.*

235. Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356, 2362-68 (2002).

236. *See generally* IND. FIN. AUTH., REMEDIATION GRANT GUIDELINES, *supra* note 232.

237. *See* Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-16.

238. 42 U.S.C. § 9604(K)(5)(C)(x) (2000 & Supp. IV 2004).

239. *Id.* § 9604(K)(3)(C)(ii).

240. The Stipulated Remediation Grants have very similar scoring criteria to the Stipulated Assessment Grants; therefore, the analysis supplied for the Assessments Grants can be used for the Stipulated Remediation Grants.

241. IND. FIN. AUTH., REMEDIATION GRANT GUIDELINES, *supra* note 232, at 4.

242. *Id.* (the level of required investment increases as the median household income increases).

points are assigned to various criteria used to evaluate the projects.[243] Demographic factors, which include the poverty rate, along with local support for the project, are heavily weighted.[244]

Several criteria for ranking applicants are based on principles of environmental justice. This is an encouraging note because brownfields revitalization and environmental justice considerations are inextricably linked.[245] When the Indiana Brownfields Program assigns substantial weight to the poverty rate, whether the site is located in certain designated brownfields revitalization zones or slums and blighted areas, IFA officials are undoubtedly concerned with using the selection criteria to address environmental justice concerns.[246]

Moreover, encouraging developers to revitalize brownfields in an area where widespread blight and poverty are prevalent ameliorates many negative factors associated with brownfields.[247] Once redevelopment occurs, the cycle of decline that characterized most brownfields is halted. The site is no longer an eyesore, a haven for crime, and has the potential to increase the tax revenue for the area, among other advantages.

In addition to allocating heavy weight to demographic factors when selecting projects for the Assessment Grants, the Program gives preference to projects that demonstrate high levels of local support for the project. Local support for a project is paramount. One commentator suggests that "states must allow for effective public participation by making affected communities [sic] partners throughout the decision-making process and bolstering each community's ability to evaluate project risks and compare them to project benefits."[248] A program applicant who understands the community and the distribution of the benefits and burdens will be best suited to respond to environmental justice concerns.[249] Thus, achieving environmental justice involves minority and low-income individuals, communities, and populations playing a direct, meaningful role in decision-making processes affecting their environment.[250]

The Assessment Grant requires evaluating the strength of local support for a project through public comment and local coordinated efforts to assess brownfields issues.[251] The community support component places an emphasis on proactive involvement from the community. It even goes as far as assigning points for applicants who follow up with negative comments.[252] However,

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243. *Id.* at 4-6.

244. *Id.* at 4-5.

245. *See supra* Part II.

246. *See* IND. FIN. AUTH., REMEDIATION GRANT GUIDELINES, *supra* note 232, at 6.

247. *See supra* Part I.

248. Eisen, *supra* note 180, at 889.

249. *See* Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-6.

250. *See* Michael B. Gerrard, *Environmental Justice and Local Land Use Decisionmaking*, *in* TRENDS IN LAND USE LAW, *supra* note 140, at 125-26.

251. *See* IND. FIN. AUTH., REMEDIATION GRANT GUIDELINES, *supra* note 232, at 5.

252. *Id.*

because community groups or local citizens often lack the technical expertise to effectively evaluate various aspects of a proposed project, their participation alone may not be the answer.[253] To ensure that the community plays a "meaningful role" in the decision-making process, technical assistance grants or criteria evaluating technical assistance could facilitate this process.[254] Although no single formula to effective community participation is applicable to all situations,[255] the Assessment Grant provides one method. The Assessment Grant has mechanisms in place that seek to take environmental justice considerations into account that go further than the bare minimum.

2. Low-Interest Loan Program Addresses Environmental Justice Considerations.—The Program provides Low-Interest Loans as well.[256] A political subdivision may apply for a low-interest loan to finance costs associated with the various phases of brownfields redevelopment.[257] In addition to the criteria used for project selection for the grants mentioned *supra*, the IFA requires additional criteria to determine the priority for a loan application. Priority will be given to a former gas station site or a site where underground storage tanks have been used to store petroleum, hazardous substances, hazardous wastes, or other product(s); or a site "located within one-half mile (0.5) of any of the following: [a] child care center[;] [a] child care home[;] [a] child caring institution[;] [a] school age child care program[;] [a]n elementary or a secondary school attended by students in kindergarten or grades [one] through [twelve]."[258] The priority considerations given to sites located within one-half mile of institutions concerned with children, reveal IFA officials' concern for vulnerable populations.

Providing consideration for vulnerable populations can be viewed in several ways. Some may argue in favor of brownfields redevelopment projects in areas where children frequent. Proponents believe that the environmental risks for most brownfields redevelopment projects are exaggerated, and the economic benefits outweigh the risks.[259] On the other hand, some are concerned that there are too many health risks and not enough benefits to brownfields redevelopment.[260] In many cases, redevelopment in accordance with a state voluntary cleanup program allows for lower cleanup standards than required by

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253. *See* Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-27.

254. *See infra* Part V.A.

255. IND. FIN. AUTH., REMEDIATION GRANT GUIDELINES, *supra* note 232, at 4-6.

256. IND. CODE § 13-19-5-1 (Supp. 2007).

257. *Id.*

258. IND. FIN. AUTH., INDIANA BROWNFIELDS PROGRAM, LOW-INTEREST LOAN GUIDELINES, at A-4 (2007), http://www.in.gov/ifa/brownfields/pdffiles/BFLoanGuides0307.pdf (citations omitted) [hereinafter IND. FIN. AUTH., LOW-INTEREST LOAN GUIDELINES].

259. *See* Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-51.

260. *See id.* at 31-49.

the EPA in efforts to attract industry.[261] Brownfields detractors would argue that standards in areas frequented by vulnerable populations should be higher for these projects, not lower.[262]

Considering both arguments, giving priority to areas near children will attract applicants who are interested in redeveloping the site. Even with a lower cleanup standard, it is all but certain that redevelopment will result in an overall improvement of the site. Therefore, the emphasis that the Low-Interest Loan program places on sites near children for priority consideration highlights the Program's concern with such populations. Viewed in isolation, this highly specific priority consideration is promising. Yet, on balance, the Low-Interest Loan program suffers from the same substantive public participation deficiencies as the other programs.[263]

The Program boasts noble goals focusing on the rehabilitation, reuse, and redevelopment of brownfields.[264] However, legislation governing the Program is devoid of language requiring environmental justice considerations to be taken into account when selecting recipients for financial assistance.[265] The statute contains permissive, not mandatory language as guidance when selecting sites to award loans and other financial assistance for brownfields redevelopment.[266]

The legislation providing for the creation of the VRP and the Indiana Brownfields Program contains no explicit provisions for environmental justice. Yet, both the Indiana Brownfields Program and the VRP take environmental justice considerations into account. However, more substantive public participation mechanisms would help strengthen the consideration of environmental justice concepts in these programs. After all, "[s]ubstantive community participation can be achieved only when the community is properly educated and given an active role in the actual planning and decision-making process."[267]

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261. *Id.*

262. *See id.* at 31-50.

263. *See* IND. FIN. AUTH., LOW-INTEREST LOAN GUIDELINES, *supra* note 258, at A-3 to -4 (listing the criteria for priority selection which otherwise mirrors the Stipulation Assessment Grants, analyzed earlier in this section).

264. *See* IND. CODE § 13-19-5-1 (Supp. 2007).

265. *See id.* § 13-19-5-8.

266. *See id.* The statute states:

> The authority *may* use a priority ranking system in making loans and providing other financial assistance under this chapter based on the following: (1) Socioeconomic distress in an area, as determined by the poverty level and unemployment rate in the area . . . [and] other factors the authority determines will assist in the implementation of this chapter.

Id. (emphasis added).

267. John C. Chambers, *Community Participation in Brownfields Redevelopment*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE, *supra* note 8, at 243, 252.

VI. SUBSTANTIVE PUBLIC PARTICIPATION

Part VI argues that Indiana's brownfields programs require stronger mechanisms to ensure substantive public participation as a way to pursue environmental justice. First, this Part explores the benefits of offering technical assistance grants to facilitate substantive public participation. Next, this Part discusses community working groups as a more effective method for decision-making and policy planning than a bare bones notice and comment requirement.

A. Technical Assistance Grants

Technical assistance grants ("TAGs") are one mechanism that Indiana's brownfields programs should employ to achieve more substantive community participation. Brownfields projects often involve highly technical issues ranging from environmental risk assessments to future economic impacts. Thus, community groups or local citizens often lack the technical expertise to evaluate cleanup plans at contaminated sites. Consequently, even with community participation and adequate information access, the citizens may not be in the best position to deliberate effectively. TAGs could be used to hire technical advisors, to help a community disseminate information to the general public, and other information efforts concerning the site.

For example, Massachusetts uses TAGs to help individuals or groups who challenge a prospective purchaser's plans to redevelop contaminated sites.[268] The purpose of the Massachusetts TAGs is to assist citizens in obtaining an understanding of the technical aspects of a waste site assessment and proposed cleanup options.[269] Unlike the federal TAG program, which is often criticized for its complexity and red tape,[270] a TAG program authorized by Indiana's legislature could be more effective. IFA and IDEM are in an excellent position to effectively administer a TAG program because they express a commitment towards achieving environmental justice and have closer geographic ties. Such a program would assist communities in achieving the requisite amount of knowledge to facilitate truly meaningful public participation.

B. Community Working Groups

Working in tandem with the requirement for notice and comment, community working groups ("CWG") are vehicles for meaningful public participation in environmental justice situations.[271] A CWG is a group of representatives selected primarily from the community who comment on remedial plans for sites.

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268. *See generally* Toxics Action Ctr., *A Citizen's Guide to Massachusetts Technical Assistance Grants*, http://www.toxicsaction.org/taggrants.html (last visited Mar. 4, 2007).

269. *Id.*

270. Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-28.

271. *See generally* Sara Pirk, *Expanding Public Participation in Environmental Justice: Methods, Legislation, Litigation, and Beyond*, 17 J. ENVTL. L. & LITIG. 207, 235-37 (2002).

Individuals in the community are the stakeholders directly at risk; therefore, community members comprise the CWG's primary constituency. For example, the Clinton Administration proposed forming a CWG composed of representatives including: "adjacent residents; those persons directly . . . affected by the facility; . . . resident citizen groups; . . . members of the local business community; and groups that received [TAGs]"[272] to comment on future uses of NPL sites.[273]

Indiana should require the formation of a CWG when either a threshold number or percentage of the population requests its formation.[274] Additionally, a CWG should form when the State deems it necessary.[275] The CWG should also be active at each stage of a brownfields redevelopment project. First, the CWG should provide notice to the rest of the community about the status of the site at all stages of a project. Second, the group should give its opinion on issues associated with the site, such as acceptable cleanup standards. Therefore, it is the community who has a direct role in deciding the acceptable level of risks. When community members are engaged, as with a CWG, they are more likely to seek out the information and gain a better understanding of the risks involved. This informed opinion helps all stakeholders involved in the project.

The formation of a CWG addresses the environmental justice concern of allowing the affected community to play an active and vital role in the entire decision-making process. Thus, the community would have a real voice in the decision-making process. A CWG builds on the statutory requirement of notice and comment. However, it is a more flexible and efficient tool because the CWG formation occurs at the beginning of a project, and it is not an afterthought.

When a community knows its voice is heard and its opinions are seriously considered, it will develop a sense of hope in the public participation model. CWG encourages ongoing education of not only its members, but also the community as a whole. Instead of residents, with minimal knowledge of the complex issues involved, having a small window of opportunity to comment on a proposal, the CWG offers a more comprehensive alternative. A CWG is involved in each major step of a remediation plan. Furthermore, the notice and comment requirement involves reacting to a proposal after a developer or owner has already allocated resources toward a certain solution. At this stage, parties are inclined to defend their proposal, and not listen to alternatives from the community.

Moreover, the CWG forms if certain statutory conditions are met. This marks an improvement from the discretionary request for a hearing that the current notice and comment period requires. Under the current requirements, even if a public hearing is held, a room full of potentially hostile, largely uninformed residents facing off against project proponents is not the most conducive

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272. *See* Bradford C. Mank, *Public Participation in the Cleanup and Redevelopment Process*, *in* BROWNFIELDS LAW AND PRACTICE, *supra* note 18, at 31-1, 31-23 to -24.

273. *Id.*

274. *See generally* Eisen, *supra* note 180, at 1017.

275. *Id.*

atmosphere for resolving issues. Though the CWG process can be time-consuming, it offers a flexible solution to facilitate more substantive public participation in Indiana's brownfields initiatives in order to achieve environmental justice.

CONCLUSION

Indiana has a brownfields problem. Abandoned and underutilized contaminated properties burden many communities throughout the State. As a result, Indiana has implemented brownfields initiatives to encourage redevelopment of these sites. Additionally, recent amendments to CERCLA have further reduced the barriers to redevelopment. The subsequent brownfields redevelopment is a positive outcome to these legislative efforts. Yet, environmental justice considerations remain a concern because brownfields are oftentimes located in predominately minority and low-income communities.

Indiana's brownfields initiatives and policies reflect a desire to promote environmental justice. Indiana employs a public notice and comment period for the VRP; and the Indiana Brownfields Program utilizes a priority ranking system. However, a true pursuit of environmental justice requires moving past the minimal requirements and towards a more substantive solution. Indiana was among the first states to encourage brownfields redevelopment through the use of statutes. In like manner, Indiana should lead the way by crafting its brownfields programs to more fully consider environmental justice concerns. Indiana's brownfields programs should include technical assistance grants and community working groups in its toolbox for achieving environmental justice. Then, Indiana's brownfields initiatives will be vehicles fueled for the pursuit of environmental justice.

INDIANA PROPOSED DEFENSE OF MARRIAGE AMENDMENT: WHAT WILL IT DO AND WHY IS IT NEEDED

MELISSA B. NEELY*

INTRODUCTION

Same-sex marriage has become one of the political and legal hot buttons of our time. Prior to 1993, only seven states had statutes that prohibited marriage between members of the same sex.[1] Now, forty-five states either have statutes or constitutional amendments that ban same-sex marriage.[2] With the passage of its Defense of Marriage Act in 1997, Indiana became one of those forty-five states.[3] In the November 2006 elections, eight states had initiatives for Defense of Marriage Amendments to their state constitution.[4] Seven of the eight states passed the amendments.[5] All seven of these states already had a Defense of Marriage statute.[6] In February 2004, Indiana State Senator Brandt Hershman proposed an amendment to the Indiana Constitution to ban same-sex marriage.[7] One year later, the proposed amendment passed its first step on its way to adoption within the state constitution.[8]

This Note examines the potential effects and the purpose of Indiana's Defense of Marriage Amendment. Part I of the Note reviews the history of the same-sex marriage movement in the United States generally and Indiana in particular. Part II of the Note examines how passage of the amendment would affect current Indiana law and the potential deprivation of benefits that same-sex couples would likely suffer. Part II also examines the effect the amendment would have on Indiana's future passage of a Vermont-style civil union statute. Part III of the Note discusses the rationale behind the ban on same-sex marriage and questions whether it is rationally related to the state's interest in marriage.

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1. RICHARD A. LEITER, ANNULMENT AND PROHIBITED MARRIAGE (2005), State Stat. Surveys Annulment (Westlaw).

2. The Heritage Foundation, Outline of State Laws, http://www.heritage.org/Research/Family/Marriage50/Dataforall50states.cfm (last visited Jan. 6, 2007) [hereinafter Heritage].

3. IND. CODE § 31-11-1-1 (2004).

4. Thomas Frank, *Voters' Ballots Inundated with Divisive Measures; State Amendments Include Laws on Abortion Rights, Same-Sex Marriage*, USA TODAY, Nov. 8, 2006, at 11A; *Selected Statewide Referendums*, USA TODAY, Nov. 8, 2006, at 13A.

5. Thomas Frank, *Liberals Mark Big Victories with Some Ballot Initiatives*, USA TODAY, Nov. 9, 2006, at 13A, *available at* http://www.usatoday.com/news/politicselections/vote2006/2006-11-08-ballot-initiatives_x.htm.

6. Heritage, *supra* note 2 (identifying Alabama, Colorado, Idaho, South Carolina, South Dakota, Tennessee, and Virginia as having a Defense of Marriage Statute).

7. Press Release, State Senator Brandt Hershman, Senate Passes Resolution to Protect Marriage (Feb. 5, 2004), http://www.in.gov/S7/2-5-04.htm [hereinafter Hershman Press Release].

8. GayIndy.Org, The Marriage Discrimination Amendment, http://www.gayindy.org/amendment (last visited Jan. 28, 2007).

The Note concludes that the amendment is not needed to protect the existing Indiana Defense of Marriage Statute and does not protect the state's interest in traditional marriage.

I. HISTORY OF THE SAME-SEX MARRIAGE MOVEMENT

Webster's Dictionary defines marriage as "the social institution under which a man and woman establish their decision to live as husband and wife by legal commitments."[9] A second definition provides that marriage is "a relationship in which two people have pledged themselves to each other in the manner of husband and wife, without legal sanction."[10] There are over half a million same-sex couples whose relationship would fit this second definition of marriage.[11] Over the last three decades, gay couples have litigated to achieve recognition of their relationship as marriage. The purpose of the litigation for same-sex marriage has been the legal recognition of these unions.[12]

A. American History

The first litigated case in which a same-sex couple sought the right to marry began in Minnesota in 1970.[13] A same-sex couple filed an application for a marriage license which was denied.[14] The couple filed suit in state court.[15] The plaintiffs challenged "that the absence of an express statutory prohibition against same-sex marriage evince[d] a legislative intent to authorize such marriages."[16] The Supreme Court of Minnesota, utilizing both standard and legal dictionary definitions of marriage as a heterosexual union and interpreting the marriage statute drafter's intent, held that the state marriage statute did not authorize same-sex marriage even though the statute did not specify that a marriage required an opposite sex couple.[17] The plaintiffs also asserted that the Minnesota statute was

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9. WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 1179 (1996).

10. *Id.*

11. TAVIA SIMMONS & MARTIN O'CONNELL, U.S. CENSES BUREAU, MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000, at 1, *available at* http://www.census.gov/prod/2003pubs/censr-5.pdf. Five hundred and ninety four thousand households self-identified as same-sex couples sharing living quarters and a close personal relationship. *Id.*

12. Adams v. Howerton, 673 F.2d 1036, 1038 (9th Cir. 1982); Baehr v. Lewin, 852 P.2d 44, 49 (Haw. 1993); Morrison v. Sadler, 821 N.E.2d 15, 19 (Ind. Ct. App. 2005); Jones v. Hallahan, 501 S.W.2d 588, 589 (Ky. 1973); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 949 (Mass. 2003); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971); Baker v. State, 744 A.2d 864, 867 (Vt. 1999); Singer v. Hara, 522 P.2d 1187, 1187 (Wash. Ct. App. 1974).

13. *Baker*, 191 N.W.2d at 185; William C. Duncan, *The Litigation to Redefine Marriage: Equality and Social Meaning*, 18 BYU J. PUB. L. 623, 624 (2004).

14. *Baker*, 191 N.W.2d at 185.

15. *Id.*

16. *Id.*

17. *Id.* at 186.

a violation of Due Process and Equal Protection under federal law.[18] The court held that the statute did not violate the Fourteenth Amendment of the United States Constitution.[19] Although "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious marital discriminations," the court said that "in commonsense and in a constitutional sense, there is a clear distinction between a marital restriction based merely upon race and one based upon the fundamental difference in sex."[20]

In 1972, the plaintiffs appealed their case to the United States Supreme Court.[21] The Court did not deny certiorari, but rather dismissed the appeal for "want of a substantial federal question."[22] The Court's dismissal of the case created binding precedent that "state bans on same-sex marriage do not violate the United States Constitution."[23] The Court has stated that a dismissal of an appeal for want of a substantial federal question is a disposition on the merits of the case.[24] Thus, until the Supreme Court indicates otherwise, lower courts should treat challenges to state marriage statutes, based on a violation of the Fourteenth Amendment of the United States Constitution, as not raising a substantial federal question.[25]

A handful of other cases followed during the next two decades, mostly in state courts.[26] The plaintiffs did not prevail in any of the cases.[27] That changed in 1993, however, when the Supreme Court of Hawaii made their ruling in *Baehr v. Lewin*.[28]

In 1990, three same-sex couples filed suit contesting Hawaii's marriage statute.[29] Following the dismissal of the case by the lower court, the couples

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18. *Id.*

19. *Id.* at 187.

20. *Id.*

21. Baker v. Nelson, 409 U.S. 810, 810 (1972).

22. *Id.*

23. Morrison v. Sadler, 821 N.E.2d 15, 19 (Ind. Ct. App. 2005); *see also* Duncan, *supra* note 13, at 625.

24. Hicks v. Miranda, 422 U.S. 332, 344 (1975); *see also* Ohio v. Price, 360 U.S. 246, 247 (1959).

25. Port Auth. Bondholders Protective Comm. v. Port of N.Y. Auth., 387 F.2d 259, 263 (2d Cir. 1967); Duncan, *supra* note 13, at 625.

26. Dean v. District of Columbia, 653 A.2d 307 (D.C. 1995); Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982); Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); De Santo v. Barnsley, 476 A.2d 952 (Pa. Super. Ct. 1984); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974); Duncan, *supra* note 13, at 624-29.

27. *Dean*, 653 A.2d at 310; *Adams*, 673 F.2d at 1038; *Jones*, 501 S.W.2d at 590; *De Santo*, 476 A.2d at 952; *Singer*, 522 P.2d at 1197; Duncan, *supra* note 13, at 624-29.

28. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Duncan, *supra* note 13, at 631.

29. Duncan, *supra* note 13, at 630. The statute at that time provided:

In order to make valid the marriage contract, it shall be necessary that:

(1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, *brother and sister* of the half as well as to

appealed to the Supreme Court of Hawaii.[30] The Supreme Court of Hawaii held that the state marriage statute was a sex based classification and, thus, was subject to a "strict scrutiny" test under the Equal Protection Clause.[31] Under Hawaiian law, the strict scrutiny test presumes the statute to be at odds with Hawaii's constitution unless the State can show compelling state interests justifying the statute.[32] The case was remanded because the lower court did not utilize a strict scrutiny test.[33]

On remand, the State was unable to overcome the presumption of unconstitutionality, and the marriage statute was declared unconstitutional by the circuit court.[34] The State appealed, but before the appeal could be heard by the Supreme Court of Hawaii, a state constitutional amendment was passed reserving the authority to define marriage to the legislature.[35] Thus, the marriage statute was no longer unconstitutional because the legislature had the authority to define marriage. The challenged statute, as it exists today, designates marriage as a union between a man and a woman.[36]

In the aftermath of *Baehr*, a virtual flood of state legislation occurred throughout the United States. Prior to 1993, only seven states had statutes that

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the whole blood, *uncle and niece*, *aunt and nephew*, whether the relationship is legitimate or illegitimate;

(2) Each of the parties at the time of contracting the marriage is at least sixteen years of age; provided that with the written approval of the family court of the circuit court within which the minor resides, it shall be lawful for a person under the age of sixteen years, but in no event under the age of fifteen years, to marry, subject to section 572-2 [relating to consent of parent or guardian];

(3) The *man* does not at the time have any lawful *wife* living and that the *woman* does not at the time have any lawful *husband* living;

(4) Consent of neither party to the marriage has been obtained by force, duress, or fraud;

(5) Neither of the parties is a person afflicted with any loathsome disease concealed from, and unknown to, the other party;

(6) It shall in no case be lawful for any person to marry in the State without a license for that purpose duly obtained from the agent appointed to grant marriage licenses; and

(7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the *man and woman* to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony.

Baehr, 852 P.2d at 49 n.1 (quoting HAW. REV. STAT. § 572-1 (1985)).

30. *Baehr*, 852 P.2d at 48; Duncan, *supra* note 13, at 630.

31. *Baehr*, 852 P.2d at 64-65.

32. *Id.*

33. *Id.* at 68.

34. Baehr v. Miike, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996).

35. Duncan, *supra* note 13, at 632-33.

36. HAW. REV. STAT. ANN. § 572-1 (LexisNexis 2005).

prohibited marriage between members of the same sex.[37] Within five years, however, twenty-six additional states passed either a statute or constitutional amendment barring same-sex marriage.[38] Additionally, the United States Congress passed the Defense of Marriage Act of 1996[39] defining marriage as the union of a male and a female.[40] Now, forty-five states have either statutes or constitutional amendments that ban same-sex marriages.[41]

Vermont was the first state to grant same-sex couples legal recognition of their relationship.[42] In a case brought by three same-sex Vermont couples seeking the right to marry, the Supreme Court of Vermont held that the Vermont state government was "constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law."[43] The court further noted that such legal recognition could be done by "inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative."[44] Vermont, while maintaining the definition of marriage as "the legally recognized union of one man and one woman,"[45] enacted legislation allowing same-sex couples to obtain "civil unions," granting them the same state protections and benefits extended to

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37. *See* LEITER, *supra* note 1 (citing KAN. STAT. ANN. § 23-101 (1995); MD. CODE ANN., FAM. LAW. § 2-201 (West 2006); N.H. REV. STAT. ANN. §§ 457:1-:2 (LexisNexis 2007); OKLA. STAT. ANN. tit. 43, § 3 (West 2001); OR. REV. STAT. § 106.010 (2005); UTAH CODE ANN. § 30-1-2 (1998 & Supp. 2007); VA. CODE ANN. § 20-45.2 (2004)).

38. *Id.* (citing ALASKA CONST. art. 1, § 25; ALA. CODE § 30-1-19 (1998); ALASKA STAT. § 25.05.011 (2006); ARIZ. REV. STAT. ANN. § 25-101 (2007); ARK. CODE ANN. § 9-11-109 (West 2004); FLA. STAT. ANN. § 741.212 (West 2005); GA. CODE ANN. § 19-3-3.1 (West 2003); HAW. REV. STAT. ANN. § 572-1 (LexisNexis 2005); IDAHO CODE ANN. § 32-201 (2006); 750 ILL. COMP. STAT. 5/212 (West 1999 & West Supp. 2007); IND. CODE § 31-11-1-1 (2004); IOWA CODE § 595.2 (West 2001); KY. REV. STAT. ANN. § 402.005 (LexisNexis 1999); ME. REV. STAT. ANN. tit. 19-A, § 701 (1998); MICH. COMP. LAWS ANN. § 551.1 (West 2005); MINN. STAT. ANN. § 517.03 (West 2006); MISS. CODE ANN. § 93-1-1 (West 2007); MO. ANN. STAT. § 451.022 (West 2003); MONT. CODE ANN. § 40-1-401 (2007); N.C. GEN. STAT. § 51-1.2 (2005); N.D. CENT. CODE § 14-03-01 (2004); 23 PA. CONS. STAT. ANN. § 1704 (West 2001); S.C. CODE ANN. § 20-1-15 (Supp. 2006); S.D. CODIFIED LAWS § 25-1-1 (2004); TENN. CODE ANN. § 36-3-113 (2005); TEX. FAM. CODE ANN. § 2.001 (Vernon 2006); WASH. REV. CODE ANN. § 26.04.020 (West 2005)).

39. Pub L. No. 104-199, 100 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2000); 28 U.S.C. § 1738 (2000)).

40. Heritage, *supra* note 2.

41. *Id.* The five states having neither a statute nor constitutional amendment banning same-sex marriage are New Jersey, New Mexico, New York, Rhode Island, and Massachusetts. *Id.* Connecticut's civil union statute defines marriage as union of a man and a woman. CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2007).

42. VT. STAT. ANN. tit. 15, §§ 1201-1207 (2002); Baker v. State, 744 A.2d 864, 867 (Vt. 1999).

43. *Baker*, 744 A.2d at 867.

44. *Id.* at 867-68.

45. VT. STAT. ANN. tit. 15, § 1201 (2002).

married couples.[46]

Massachusetts is currently the only state in which same-sex marriages are legal.[47] In 2001, seven Massachusetts same-sex couples, four of which had children, filed suit seeking the right "to affirm publicly their commitment to each other and to secure the legal protections and benefits afforded to married couples and their children."[48] The Supreme Judicial Court of Massachusetts declared that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[49]

In 2005, Connecticut passed civil union legislation that, like Vermont, provides same-sex couples a means of legalizing their union.[50] The Connecticut statute provides that a same-sex couple with a civil union "shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage."[51] The same statute defines marriage as "the union of one man and one woman."[52]

Most recently, in a suit brought against various New Jersey state officials by seven long-term, same-sex couples seeking the right to marry, the Supreme Court of New Jersey found that there was no fundamental right for same-sex marriage.[53] The court stated that for a right to be considered fundamental it must be "deeply rooted in the traditions, history, and conscience of the people" and then determined that same-sex marriage is not part of the tradition and history of the people of New Jersey.[54] However, the court also found that "the unequal

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46. *Id.* §§ 1201-1207; Phyllis G. Bossin, *Same-Sex Unions: The New Civil Rights Struggle or an Assault on Traditional Marriage?*, 40 TULSA L. REV. 381, 394 (2005). A civil union is "[a] marriage-like relationship, often between members of the same sex, recognized by civil authorities within a jurisdiction." BLACK'S LAW DICTIONARY 264 (8th ed. 2004). A Vermont statute provides a "nonexclusive list of legal benefits, protections and responsibilities" granted to married spouses that apply in like manner to parties to a civil union. VT. STAT. ANN. tit. 15, § 1204 (2002). Some of these benefits are laws pertaining to acquisition, ownership, or transfer of real or personal property, including holding property as tenants by the entirety; actions for wrongful death, emotional distress, and loss of consortium; probate and non-probate transfers; adoption law; insurance for state employees; spousal abuse programs; victim's compensation rights; worker's compensation benefits; laws relating to medical care and treatment, hospital visitation, and notification; family leave benefits; public assistance benefits; tax laws; spousal privilege; laws pertaining to loans to veterans; and the definition of the family farmer. *Id.*

47. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003); Elisabeth Salemme, *The State of Gay Marriage*, TIME, Aug. 7, 2006, at 17.

48. *Goodridge*, 798 N.E.2d at 948.

49. *Id.* at 969.

50. CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2007).

51. *Id.*

52. *Id.*

53. Lewis v. Harris, 908 A.2d 196, 211 (N.J. 2006).

54. *Id.* at 210-11.

dispensation of rights and benefits to committed same-sex partners can no longer be tolerated under our State Constitution."[55] The court held that "denying rights and benefits to committed same-sex couples that are statutorily given to their heterosexual counterparts violates the equal protection guarantee" of the New Jersey Constitution.[56] The Supreme Court of New Jersey ordered that "the State must provide to committed same-sex couples, on equal terms, the full rights and benefits enjoyed by heterosexual married couples."[57] Subsequently, the New Jersey Legislature passed civil union legislation granting same-sex partners in a civil union the same responsibilities and protections afforded to a married couple.[58]

B. Indiana History

Like many other states in the wake of *Baehr v. Lewin*, the Indiana state legislature enacted a ban on same-sex marriage in 1997.[59] The statute declared that: "Only a female may marry a male. Only a male may marry a female."[60] The statute further declared that "[a] marriage between persons of the same gender is void in Indiana even if the marriage is lawful in the place where it is solemnized."[61]

In August 2002, three long-term same-sex couples, who had obtained Vermont civil unions, sought an injunction to have marriage licenses issued to them by Indiana's Hendricks and Marion county clerks. [62] The couples maintained that the Indiana Defense of Marriage Act ("DOMA") violated several provisions of the state constitution, specifically sections 1, 12, and 23 of article I.[63] The state filed a motion to dismiss on grounds of failure to state a claim upon

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55. *Id.* at 200.

56. *Id.*

57. *Id.* at 224.

58. N.J. STAT. ANN. § 37:1-29 (West 2007) (defining a civil union as "the legally recognized union of two eligible individuals of the same sex"). The statute provides that "[p]arties to a civil union shall receive the same benefits and protections and be subject to the same responsibilities as spouses in a marriage." *Id.*; *see also* Robert Schwaneberg, *Civil Union Benefits to End at State Line: Many Federal Rights Are Still Not Granted*, STAR-LEDGER (Newark, N.J.), Jan. 2, 2007, at 1, *available at* 2007 WLNR 52111 [hereinafter Schwaneberg, *Civil Union Benefits*].

59. IND. CODE § 31-11-1-1 (2004).

60. *Id.*

61. *Id.*

62. Morrison v. Sadler, 821 N.E.2d 15, 19 (Ind. Ct. App. 2005).

63. *Id.* The first of the challenged provisions concerned equality for Indiana residents. *Id.* at 21. Article I, section 23 provides that "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." IND. CONST. art 1, § 23. The second of the challenged provisions regards the natural rights of citizens. *Id.* at 31. Article I, section 1 states:

> WE DECLARE, That all people are created equal; that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the

which relief may be granted, and the court dismissed the claim.[64]

The plaintiffs also lost their appeal.[65] The court decided that "the Indiana Constitution does not require the governmental recognition of same-sex marriage."[66] The court reasoned that "because opposite-sex marriage furthers the legitimate state interest in encouraging opposite-sex couples to procreate responsibly and have and raise children within a stable environment" it did not violate sections 12 and 23 of article I of the Indiana Constitution.[67] The court went on to say that "[r]egardless of whether recognizing same-sex marriage would harm this interest, neither does it further it."[68] The statute was held not to violate article I, section 1 as marriage, let alone same-sex marriage, was not contemplated as a "core value"[69] by the framers of the provision.[70]

In 2004, Indiana State Senator Brandt Hershman introduced an amendment to the Indiana Constitution to prohibit same-sex marriages.[71] The proposed amendment provides: "(a) Marriage in Indiana consists only of the union of one man and one woman. (b) This Constitution or any other Indiana law may not be construed to require that marital status or the legal incidents of marriage be conferred upon unmarried couples or groups."[72] Although the resolution was passed overwhelmingly by the Senate, it did not make it to a vote in the State House of Representatives.[73] One year later, the resolution easily passed both the Senate and House of Representatives.[74]

Ratification of the amendment requires passage in both houses of the

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> pursuit of happiness; that all power is inherent in the People; and that all free governments are, and of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being. For the advancement of these ends, the People have, at all times, an indefeasible right to alter and reform their government.

IND. CONST. art 1, § 1. The third challenged provision concerned the openness of the courts to the populace. *Id.* at 34. Article I, section 12 provides that "[a]ll courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily, and without delay." IND. CONST. art 1, § 12.

64. *Morrison*, 821 N.E.2d at 19.

65. *Id.* at 35.

66. *Id.*

67. *Id.*

68. *Id.*

69. The court stated that "a 'core value' under the Indiana Constitution is arguably the rough equivalent to a 'fundamental right' under the federal or other state constitutions." *Id.* at 32. Furthermore, the court said that determination of whether an item "amounts to a constitutional 'core value' is a judicial question that depends on the purpose for which a particular constitutional guarantee was adopted and the history of Indiana's constitutional scheme." *Id.* at 33.

70. *Id.* at 33-34.

71. Hershman Press Release, *supra* note 7.

72. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

73. Hershman Press Release, *supra* note 7; GayIndy.Org, *supra* note 8.

74. GayIndy.Org, *supra* note 8.

legislature without revision in two consecutive general assemblies and then approval by Indiana voters as a referendum in a general election.[75] The amendment passed the Indiana Senate by a 39-10 vote.[76] The House Committee on Rules and Legislative Procedure deadlocked on this issue; thus, the amendment will not appear before the Indiana House in 2007.[77] The amendment could still be considered for a vote in the 2008 sessions.[78]

II. THE EFFECT OF PASSAGE OF THE DEFENSE OF MARRIAGE AMENDMENT

The proposed amendment to the Indiana Constitution to defend traditional marriage consists of two separate yet related clauses: "(a) Marriage in Indiana consists only of the union of one man and one woman. (b) This Constitution or any other Indiana law may not be construed to require that marital status or the legal incidents of marriage be conferred upon unmarried couples or groups."[79] The first clause restricts marriage to a union between one man and one woman. The second clause bans the recognition of marital status to all but a married heterosexual couple and further bans the application of "legal incidents of marriage" to all but married heterosexual couples. To understand the potential ramifications of the passage of the amendment, each clause must be considered separately.

A. Definition of Marriage

The first part of the proposed amendment defines a marriage as "the union of one man and one woman."[80] This language essentially paraphrases the current Indiana DOMA, which states that: "Only a female may marry a male. Only a male may marry a female."[81] Both definitions restrict marriage to a heterosexual couple. Under either the statute or the proposed amendment, a same-sex couple would be unable to marry in Indiana. There appears to be no legal difference between the two statements.

The main legal effect of incorporation of this definition of marriage into the Indiana Constitution would be the preemption of the Indiana Supreme Court from ruling that the current DOMA is unconstitutional and possibly granting marital recognition to same-sex couples. Without the amendment, it would be possible for the Indiana Supreme Court or the Indiana Court of Appeals to declare the

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75. IND. CONST. art 16, § 1.

76. Bryan Corbin, *Same-Sex Measure Appears Dead*, EVANSVILLE COURIER & PRESS, Apr. 4, 2007, at B1; Niki Kelly, *General Assembly: Gay Union Ban Earns Senate Nod; Amendment Goes to House*, FORT WAYNE J. GAZETTE, Feb. 13, 2007, at 1C; Bill Ruthhart, *Marriage Amendment, Round 2; Lawmakers Revisit Divisive Effort to Solidify State's Same-Sex Ban*, INDIANAPOLIS STAR, Jan. 31, 2007, at A1 [hereinafter Ruthhart, *Round 2*].

77. Corbin, *supra* note 76.

78. *Id.*

79. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

80. *Id.*

81. IND. CODE § 31-11-1-1 (2004).

statute unconstitutional. The Indiana Court of Appeals for the Second District has already declared that the statute was not at odds with the state constitution in a suit challenging the statute.[82] Furthermore, the stated purpose of the amendment is: "An amendment to the Indiana Constitution would prevent Indiana courts from taking any action to recognize same sex marriages."[83]

B. Banning Recognition of Incidents of Marriage

The second part of the proposed amendment may have the most impact on Indiana law. It states that "[t]his Constitution or any other Indiana law may not be construed to require that marital status or the legal incidents of marriage be conferred upon unmarried couples or groups."[84] The legislature does not define "a legal incident of marriage," but for the purposes of this paper it will be taken as rights, benefits, or privileges granted to a person who is legally married. The United States Supreme Court used the term when referring to government benefits and property rights associated with marriage.[85] Additionally, debaters of the proposed amendment are using the term to refer to marriage benefits and laws applicable to married couples.[86]

Opponents of the amendment voice concern that the new amendment will be used to deprive unmarried couples, same-sex and heterosexual, of domestic partner health benefits.[87] Opponents also fear that the amendment will be used to prevent application of domestic violence statutes to unmarried heterosexual couples.[88] The amendment could also have a major impact on future legal recognition of same-sex couples, such as the enactment of Indiana civil unions for same-sex couples or the recognition of out-of-state civil unions. Should civil union legislation be enacted in Indiana, the amendment could affect the application of many state laws to the parties of the civil union, including inheritance, property rights, death benefits, and domestic relations laws.

1. Health Benefits.—Health insurance coverage provided by an employer for their employee and the employee's spouse is one of the benefits of marriage for many couples in today's society. Some progressive private companies, universities, and municipalities also offer health insurance coverage for domestic partners, including same-sex partners.[89] Opponents of the proposed amendment

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82. Morrison v. Sadler, 821 N.E.2d 15, 19 (Ind. Ct. App. 2005).

83. Hershman Press Release, *supra* note 7.

84. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

85. Turner v. Safley, 482 U.S. 78, 96 (1987).

86. Ruthhart, *Round 2*, *supra* note 76; Bill Ruthhart, *Same-Sex Marriage Ban Passes Committee; Senate Panel Approves Amendment 7-4; Activists Protest at Statehouse*, INDIANAPOLIS STAR, Feb. 1, 2007, at A1 [hereinafter Ruthhart, *Committee*].

87. *See* Ruthhart, *Round 2*, *supra* note 76.

88. *Id.*

89. In Indiana, health benefits for the same-sex partner of an employee are offered by Indiana University, DePauw University, Ball State University, Butler University, Purdue University, City of Bloomington, Conesco Inc., Guidant Corp., Cummins Inc., WellPoint Inc., Eli Lilly & Co., and

fear that the domestic partners of some public or university employees will lose their health benefits if the amendment is adopted.[90] The amendment's opponents contend that the health insurance provided by the public employer could be considered a government benefit generally allowed only to married couples and therefore an incident of marriage.[91] Thus, domestic partner health insurance would be banned in Indiana by the proposed amendment as an "incident of marriage," thereby depriving domestic partners of the health benefits they were receiving from their partner's employer.[92] Opponents cite litigation in Michigan as supporting their concerns.[93]

In the summer of 2006, opponents of same-sex marriage filed a lawsuit in Michigan to stop Michigan State University from offering health insurance benefits to the partners of gay and lesbian university employees.[94] The plaintiffs in the suit contended that the university was violating the state's constitution.[95] Additionally, National Pride at Work, Inc., a non-profit constituency group of the American Federation of Labor-Council of Industrial Organizations (AFL-CIO), sought a declaratory judgment that the Michigan Constitution did not "prohibit public employers from conferring health benefits to same-sex domestic partners of employees."[96] The trial court granted the summary disposition sought by National Pride at Work.[97] The Governor of Michigan appealed the trial court's decision.[98]

The Michigan public employers that offered domestic partner health benefits required the employee to have entered into a domestic-partnership agreement to receive the benefits.[99] The Michigan Court of Appeals reasoned that "[b]y officially recognizing a same-sex union through the vehicle of a domestic-partnership agreement, public employers give same-sex domestic couples status similar to that of married couples."[100] The court further reasoned that the

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fourteen other smaller private employers. Human Rights Campaign, http://www.hrc.org/issues/4785.htm (lasted visited Jan. 7, 2007).

90. *See* Ruthhart, *Round 2*, *supra* note 76.

91. *See id.*; Ruthhart, *Committee*, *supra* note 86.

92. *See* Ruthhart, *Round 2*, *supra* note 76; Ruthhart, *Committee*, *supra* note 86.

93. *See* Ruthhart, *Round 2*, *supra* note 76; Ruthhart, *Committee*, *supra* note 86.

94. David Eggert, *Group Sues to Halt Same-Sex Benefits*, BOSTON.COM, July 5, 2006, http://www.boston.com/news/nation/articles/2006/07/05/group_sues_to_halt_to_same_sex_benefits/.

95. *Id.*

96. Nat'l Pride at Work, Inc. v. Governor of Mich., 732 N.W.2d 139, 145 (Mich. Ct. App. 2007). The Michigan Constitution provides: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." MICH. CONST. art. I, § 25.

97. *Nat'l Pride at Work*, 732 N.W.2d at 147.

98. *Id.*

99. *Id.* at 151.

100. *Id.* at 150.

amendment "invalidates the recognition of *'union[s]' 'similar'* to marriage *'for any purpose.'*"[101] The court held that the domestic partner benefit plans violated the "plain language of the amendment."[102]

It is difficult to forecast whether suits seeking to bar Indiana universities and public employers from offering domestic partner benefits will be filed. However, should such a suit be filed in Indiana, it is unlikely to succeed. The pertinent part of the Indiana amendment states "[t]his Constitution or any other Indiana law may not be construed to require that marital status or the legal incidents of marriage be conferred upon unmarried couples or groups."[103] This is in distinct contrast to the Michigan amendment which provides that heterosexual marriage "shall be the only agreement recognized as a marriage or similar union *for any purpose*."[104] The Indiana amendment would apply to situations where Indiana law would require the conferring of health benefits to domestic partners; whereas, the Michigan amendment bars the recognition of domestic partnerships for any purpose.

2. Domestic Violence Statutes.—Another area of concern among opponents to the amendment is the potential loss of application of Indiana's domestic violence statute to unmarried couples.[105] In 2004, Ohio amended its state constitution to bar same-sex marriage.[106] Since then there have been several challenges regarding the constitutionality of application of the Ohio domestic violence statute to unmarried couples.[107] The Ohio courts divided on this issue.

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101. *Id.* at 151 (quoting MICH. CONST. art. I, § 25) (alteration in original).

102. *Id.*

103. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

104. MICH. CONST. art. I, § 25 (emphasis added).

105. *See* Ruthhart, *Committee*, *supra* note 86.

106. OHIO CONST. art. XV, § 11. The Ohio Constitution Defense of Marriage Amendment states:

> Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.

Id.

107. State v. Hampton, No. 2005CA00292, 2006 WL 3290799, at *2 (Ohio Ct. App. Nov. 13, 2006); State v. Ramirez, No. C-050981, 2006 WL 3040638, at *2 (Ohio Ct. App. Oct. 27, 2006); State v. Rodriguez, No. H-05-020, 2006 WL 1793688, at *7 (Ohio Ct. App. June 30, 2006); Gough v. Triner, No. 05 CO 33, 2006 WL 1868330, at *5 (Ohio Ct. App. June 28, 2006); State v. Logsdon, No. 13-05-29, 2006 WL 1585447, at *6 (Ohio Ct. App. June 12, 2006), *rev'd sub nom. In re* Ohio Domestic-Violence Statute Cases, 872 N.E.2d 1212 (Ohio 2007); State v. Steineman, No. 2005-CA-46, 2006 WL 925166, at *1 (Ohio Ct. App. Apr. 7, 2006); State v. Ward, 849 N.E.2d 1076, 1077 (Ohio Ct. App. 2006), *rev'd sub nom. In re* Ohio Domestic-Violence Statute Cases, 872 N.E.2d 1212 (Ohio 2007); City of Cleveland v. Voies, No. 86317, 2006 WL 440341, at *1 (Ohio Ct. App. Feb. 23, 2006), *rev'd sub nom. In re* Ohio Domestic-Violence Statute Cases, 872 N.E.2d 1212 (Ohio 2007). The Ohio domestic violence statute provides that "[n]o person shall knowingly

Some of the courts held that there was no constitutional violation,[108] because as noted by one court, "the domestic-violence statute does not create a legal status that approximates the design, qualities, significance, or effect of marriage."[109] However, other Ohio appellate courts held the statute was in violation of the Ohio Defense of Marriage Act[110] because the statute recognizes a quasi-marital relationship for cohabitating unmarried couples.[111] The Supreme Court of Ohio resolved the issue for Ohio by holding that the domestic violence statute did not "create or recognize a legal relationship that approximates the designs, qualities or significance of marriage," and thus the statute was not unconstitutional.[112]

Like the Ohio domestic violence statute, the Indiana domestic violence statute addresses violence against the offender's spouse or a person living as the offender's spouse.[113] Because the Indiana statute addresses violence within a marriage, courts could construe application of the statute to unmarried couples at odds with the proposed amendment because it creates a marriage like status for couples living as spouses.

Although the Ohio appellate cases involved unmarried heterosexual couples,[114] domestic violence is not limited to opposite sex couples.[115] Despite the myth that domestic violence is non-existent among same-sex couples, approximately twenty-five percent of same-sex partners will experience domestic violence in their lifetime.[116]

3. Medical Decisions.—The ability to make medical decisions for an incapacitated spouse is a statutory right of married couples in Indiana.[117] Some fear that passage of the proposed marriage amendment could prevent doctors and hospitals from allowing a gay man or lesbian to make decisions for his or her

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cause or attempt to cause physical harm to a family or household member." OHIO REV. CODE ANN. § 2919.25(a) (LexisNexis 2006). The statute further defines that a "[f]amily or household member" includes, among other things, a "person living as a spouse." *Id.* § 2919.25(F)(1)(a)(I).

108. *Hampton*, 2006 WL 3290799, at *2; *Ramirez*, 2006 WL 3040638, at *2; *Rodriguez*, 2006 WL 1793688, at *7; *Gough*, 2006 WL 1868330, at *5.

109. *Ramirez*, 2006 WL 3040638, at *2.

110. *Logsdon*, 2006 WL 1585447, at *6; *Steineman*, 2006 WL 925166, at *1; *Ward*, 849 N.E.2d at 1077.

111. *Ward*, 849 N.E.2d at 1082.

112. State v. Carswell, 871 N.E.2d 547, 554 (Ohio 2007).

113. IND. CODE § 35-42-2-1.3 (Supp. 2006); OHIO REV. CODE ANN. § 2919.25 (LexisNexis 2006).

114. *Hampton*, 2006 WL 3290799, at *2; *Ramirez*, 2006 WL 3040638, at *2; *Rodriguez*, 2006 WL 1793688, at *7; *Gough*, 2006 WL 1868330, at * 5; *Logsdon*, 2006 WL 1585447, at *6; *Ward*, 849 N.E.2d at 1077; City of Cleveland v. Voies, No. 86317, 2006 WL 440341, at *1 (Ohio Ct. App. Feb. 23, 2006), *rev'd sub nom. In re* Ohio Domestic-Violence Statute Cases, 872 N.E.2d 1212 (Ohio 2007).

115. Christine Lehmann, *Domestic Violence Overlooked in Same-Sex Couples*, PSYCHIATRIC NEWS, June 21, 2002, at 22.

116. *Id.*

117. IND. CODE § 16-36-1-5 (2004).

incapacitated partner.[118] Decisions for medical treatment on behalf of the incapacitated partner would have to be made by a relative or appointee of the court unless the patient had appointed his or her partner as a health care representative.[119] Indiana law allows an adult to appoint another to act as their health care representative if this authorization is in writing, signed by the patient or a designee in the patient's presence, and "witnessed by an adult other than the representative."[120] With this authorization, the patient's partner would be able to make medical decisions for the incapacitated partner regardless of the amendment, as Indiana law allows this authorization to be given to any adult regardless of their relationship to the patient.[121]

4. Preventing Civil Unions in Indiana.—In 2000, the Vermont legislature passed Vermont Act 91, which rendered it the first state to establish civil unions for same-sex couples.[122] Since July 2000, 1286 Vermont couples and more than 8058 out-of-state couples have been joined in civil union.[123] The Vermont Civil Union Act states: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage."[124] Vermont civil unions grant the same benefits, protections, and responsibilities to same-sex couples as those granted to married spouses. Those include property rights, probate and non-probate transfers, laws relating to medical care and treatment, adoption law, state tax laws, and spousal privilege.[125]

In April 2005, Connecticut approved civil unions for same-sex couples.[126] The Connecticut civil union statute provides that same-sex couples in a civil union "shall have all the same benefits, protections and responsibilities under law, whether derived from the general statutes, administrative regulations or court rules, policy, common law or any other source of civil law, as are granted to spouses in a marriage."[127] New Jersey became the third state to offer civil unions to same-sex couples in December 2006.[128] The New Jersey law granted

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118. Carrie Ritchie, *Democrats to Allow Vote on Indiana Gay Marriage Ban*, WASH. WK., Nov. 27, 2006, http://www.pbs.org/weta/washingtonweek/voices/200611/1127local0.htm.

119. IND. CODE § 16-36-1-5.

120. *Id.* § 16-36-1-7.

121. *Id.*

122. DEBORAH L. MARKOWITZ, VERMONT SECRETARY OF STATE, THE VERMONT GUIDE TO CIVIL UNIONS (2006), http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html.

123. *Id.*

124. VT. STAT. ANN. tit. 15, § 1204 (2002).

125. *Id.*

126. Sarah Schweitzer, *Conn. Approves Gay Civil Unions; Advocates and Opponents Criticize Compromise Law*, BOSTON GLOBE, Apr. 21, 2005, at A1, *available at* 2005 WLNR 6212225.

127. CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2007).

128. Robert Schwaneberg, *Gays Get Marriage Without the Name: Corzine Signs Bill Creating Civil Unions*, STAR-LEDGER (Newark, N.J.), Dec. 22, 2006, at 1, *available at* 2006 WLNR 22387994 [hereinafter Schwaneberg, *Gays Get Marriage*].

to same-sex couples the same rights, benefits, and responsibilities (estimated at more than 800) that are granted to married couples by the state.[129] These incidents of marriage include hospital visitation, health insurance benefits for civil union partners through employers, alimony, and child support.[130]

The Vermont, Connecticut, and New Jersey civil union statutes all grant same-sex couples the ability to enjoy the same legal privileges, benefits, and responsibilities as married heterosexual couples.[131] Civil unions are considered a compromise position, granting recognition and the legal benefits of marriage without going as far as allowing gay marriage.[132] From a legal standpoint, marriage and civil unions in Vermont, Connecticut, and New Jersey appear to be equivalent, as all of the benefits, responsibilities, and rights associated with marriage are granted to the parties to a civil union.[133]

Opponents of same-sex marriage contend that civil unions are same-sex marriage by another name.[134] However, Americans appear to perceive some difference between the two; recently published polls show that although approximately 56% of Americans oppose same-sex marriage, 54% support civil unions.[135] Additionally, although polls reflect little change in opposition to same-sex marriage over the last three years, support for civil unions has grown.[136] Opinions on same-sex marriage appear to be related to religion, political ideology, and age; older Americans, conservatives, and those who consider themselves religious are the most opposed to same-sex marriage.[137]

If Indiana were to pass the proposed Defense of Marriage amendment, a future civil union statute would be unconstitutional because the amendment provides that any Indiana law may not confer marital status upon unmarried couples.[138] A civil union statute similar to Vermont's, Connecticut's, or New Jersey's grants parties to a civil union a status legally equivalent to marriage.[139] Additionally, the amendment prohibits any Indiana law from conferring on

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129. *See id.*

130. Schwaneberg, *Civil Union Benefits*, *supra* note 58.

131. CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2007); N.J. STAT. ANN. § 37:1-29 (West Supp. 2007); VT. STAT. ANN. tit. 15, § 1204 (2002).

132. *See* Schwaneberg, *Gays Get Marriage, supra* note 128; Schweitzer, *supra* note 126.

133. CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2007); N.J. STAT. ANN. § 37:1-29 (West Supp. 2007); VT. STAT. ANN. tit. 15 § 1204 (2002).

134. Schweitzer, *supra* note 126.

135. *By the Numbers: The Public and Gay Rights*, THE ADVOCATE, Sept. 12, 2006, at 20.

136. THE PEW RESEARCH CENTER, MOST WANT MIDDLE GROUND ON ABORTION; PRAGMATIC AMERICANS LIBERAL *AND* CONSERVATIVE ON SOCIAL ISSUES (2006), *available at* http://people-press.org/reports/display.php3?ReportID=283 (showing opposition to same-sex marriage—53% in July, 2003, 60% in August 2004, 53% in July 2005, 56% in July 2006; showing support of civil unions—45% in October, 2003, 48% in August 2004, 53% in July 2005, 54% in July 2006).

137. *Id.*

138. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

139. CONN. GEN. STAT. § 46b-38nn (West Supp. 2007); N.J. STAT. ANN. § 37:1-29 (West Supp. 2007); VT. STAT. ANN. tit. 15, § 1204 (2002).

unmarried couples the legal incidents of marriage.[140] The United States Supreme Court stated that government benefits conferred to married couples, property rights, and inheritance rights were incidents of marriage.[141] The granting of the rights and benefits accorded to a married couple is precisely what a civil union statute does for the parties to a civil union.[142] An Indiana civil union statute intended to give same-sex couples an equivalent legal status as a married couple would be unconstitutional.

Assuming that a civil union statute like those in Vermont, Connecticut, and New Jersey was enacted in Indiana despite its patent unconstitutionality, the impact the amendment would have on the parties to such a civil union in Indiana would be both widespread and profound. Married couples in Indiana have many legal rights and benefits by virtue of their marriage, including inheritance, property ownership, and domestic relations law (divorce, child support and custody, property division, etc.) among others.[143]

a. Inheritance.—The amendment has several implications for inheritance. For example, assume Joan and Sue have been together for ten years and are raising Sue's eleven year old daughter. Joan is a physician, and Sue is a part-time school teacher. The couple is among the first to obtain a civil union under Indiana's new civil union statute. Some time later, Joan is killed in a car accident on her way to work. Joan is survived by her partner Sue and an estranged first-cousin, Larry. Joan has no other family.

As Joan died without a will, her estate will be distributed per Indiana's intestacy statute.[144] As parties to an Indiana civil union which grants the parties the same legal status as a married couple, Sue would be considered Joan's surviving spouse and should inherit all of Joan's estate.[145] Larry challenges Sue's right to inherit, wanting Joan's sizable estate for himself. He contends that the Indiana Defense of Marriage Amendment (enacted in 2008) bars Sue from inheriting any of Joan's estate. The amendment provides, "[t]his Constitution or any other Indiana law may not be construed to require that marital status or the

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140. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

141. Turner v. Safley, 482 U.S. 78, 96 (1987).

142. CONN. GEN. STAT. ANN. § 46b-38nn (West Supp. 2007); N.J. STAT. ANN. § 37:1-29 (West Supp. 2007); VT. STAT. ANN. tit. 15, § 1204 (2002).

143. IND. CODE § 29-1-2-1 (Supp. 2006); IND. CODE § 29-1-3-1 (Supp. 2006); IND. CODE § 31-15-7-1 (2004); IND. CODE § 31-15-7-2 (2004); IND. CODE § 31-15-7-4 (2004); IND. CODE § 32-17-2-1 (2004); IND. CODE § 32-17-3-1 (2004).

144. IND. CODE § 29-1-2-1 (Supp. 2006). The statue provides that

> the surviving spouse shall receive the following share: (1) One-half (1/2) of the net estate if the intestate is survived by at least one (1) child or by the issue of at least one (1) deceased child. (2) Three-fourths (3/4) of the net estate, if there is no surviving issue, but the intestate is survived by one (1) or both of the intestate's parents. (3) All of the net estate, if there is no surviving issue or parent.

Id.

145. *Id.*

legal incidents of marriage be conferred upon unmarried couples or groups."[146] Despite Joan and Sue's civil union, Sue would be barred from inheriting because the inheritance statute considers marital status, and Larry would inherit Joan's estate leaving Sue without a home or funds.

Indiana law also protects a surviving spouse who is purposely or inadvertently left out of the testator's will or receives only a small bequest by providing the spouse an elective share.[147] For example, assume that Joan did not die intestate but had a will from nine years ago, when her relationship with Sue was new and her estate much smaller. In this will, Joan bequeathed $20,000 to Sue and the remainder of her estate to the Indiana Cancer Society. At the time the will was written, the bequest to Sue represented approximately twenty percent of Joan's estate; currently it is less than one percent, as Joan's estate is valued at slightly over two million dollars. Under the provisions of the elective share, Sue would be entitled to half of Joan's estate or one million dollars.

The Indiana Cancer Society (ICS), dismayed at losing over one million dollars, brings suit claiming that the Indiana Defense of Marriage Amendment (enacted in 2008) bars Sue taking an elective share. ICS maintains that the elective share statute provides its protection to the surviving spouse of a married couple and is thus a legal incident of marriage. The second clause of the Indiana Defense of Marriage Amendment prohibits the conferring of marital status or a legal incident of marriage on an unmarried couple.[148] Joan and Sue were partners in a civil union and were not married; therefore, Sue is not entitled to take an elective share. The court, having little choice in the matter, rules in favor of the ICS leaving Sue and her daughter with the $20,000 bequest.

b. Property rights.—Property can be held by a couple in one of three ways: as tenancy in common, as a joint tenancy, or as tenancy by the entireties.[149] In a tenancy in common, the parties each hold "equal or unequal undivided shares" giving them an "equal right to possess the whole property."[150] A joint tenancy is one where the co-owners each have an identical interest in the property that was acquired at the same time with the same instrument.[151] A joint tenancy differs from a tenancy in common in that a joint tenant also has a right of survivorship.[152] This right of survivorship grants the entire property to the surviving joint tenant upon the death of their co-owner.[153] Unless the conveyance is specifically a joint tenancy, the parties will hold the property as tenants in

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146. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

147. IND. CODE § 29-1-3-1 (Supp. 2006). The statute provides "[t]he surviving spouse, upon electing to take against the will, is entitled to one-half (1/2) of the net personal and real estate of the testator." *Id.*

148. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

149. IND. CODE §§ 32-17-2-1, -3-1 (2004).

150. BLACK'S LAW DICTIONARY 1478 (7th ed. 1999).

151. *Id.* at 1477.

152. *Id.*

153. *Id.* at 1326; JAMES L. WINOKUR ET AL., PROPERTY AND LAWYERING 351 (2002).

common.[154]

Tenancy by the entireties is reserved exclusively for married couples.[155] Tenancy by the entireties, like joint tenancy, includes the right of survivorship.[156] In Indiana, a conveyance of property to a married couple is presumed to be a tenancy by the entireties unless it is specific that it is a tenancy in common.[157] A conveyance of property to an unmarried couple, on the other hand, is presumed to be a tenancy in common unless it is specific that it is a joint tenancy.[158]

For example, assume that shortly after obtaining their civil union, Joan and Sue purchase a new home together. Their new home is in the same neighborhood as their good friends, Mark and his wife Christy. Mark and Christy have been married for five years and purchased their current home two years into their marriage. Mark and Joan are carpooling together to work when the traffic accident occurs killing them both.

Because Mark and Christy purchased their home as a married couple, they owned their home as a tenancy by the entirety.[159] When Mark died, Christy maintained sole possession of the home as if the home had been in her name only the entire three years.[160]

Sue is not as fortunate as Christy with regard to the home she and Joan purchased together. The Indiana statutes regarding property ownership restricts tenancy by the entireties to a married couple to be considered as a legal incident of marriage.[161] The Indiana Defense of Marriage Amendment prohibits the conferring of marital status or a legal incident of marriage on an unmarried couple.[162] Thus, under current law, Joan and Sue could not hold their property as a tenancy by the entireties. Unless, Joan and Sue specifically established that the property was a joint tenancy and would go to the survivor in the event of either of their deaths, the property would be held as a tenancy in common.[163] If Sue and Joan had not done this, then Sue would not take sole possession of the house by right of survivorship, but rather Joan's half interest in the home would become part of Joan's estate. In this case, Joan's half interest in the home would be passed on to either the beneficiaries of her will or her heirs at law in the event she died intestate.

Another key difference between a tenancy by the entirety and a joint tenancy or tenancy in common is that the interest of either party in a tenancy by the

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154. IND. CODE § 32-17-2-1 (2004).

155. *Id.* § 32-17-3-1.

156. *Id.*; Sharp v. Baker, 96 N.E. 627, 628 (Ind. App. 1911).

157. IND. CODE § 32-17-3-1 (2004).

158. *Id.*

159. *Id.*

160. *Id.* The statute provides that "[u]pon the death of either party to the marriage, the survivor is considered to have owned the whole of all rights under the contract from its inception." *Id.*

161. *Id.*; Turner v. Safley, 482 U.S. 78, 96 (1987).

162. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

163. IND. CODE § 32-17-2-1 (2004).

entirety is not severable during the marriage.[164] For example, Steve and Milly purchased a home after they were married. By Indiana law, Steve and Milly hold their home as a tenancy by the entirety because a conveyance to a married couple defaults to a tenancy by the entirety.[165] A colleague of Steve's proposes a business venture that Steve feels is too good to pass up, Steve proceeds to try to raise the capital for the venture by mortgaging his share of the family home. Because Milly and Steve have their home as a tenancy by the entirety and the interest of either party is not severable during the marriage, Steve is unable to do so, and the home is protected from Steve's creditors.[166]

However, if Steve and Milly were Steve and Adam who had purchased the home after obtaining their civil union, Adam would not have the same protection by the law as Milly does. As examined above, a tenancy by the entirety is an incident of marriage and would be barred from application to parties to a civil union under Indiana's Defense of Marriage Amendment.[167] A joint tenancy and tenancy in common do not have the same severability protection afforded to the holder of a tenancy in the entirety.[168] Therefore, Steve and Adam's home is not protected from Steve's creditors as would be the case for Steve and Milly.

c. Domestic relations law: divorce, child support and custody, property division.—Indiana law provides for the just and reasonable division of property during a divorce.[169] The court will divide the property regardless of whether it was owned prior to the marriage, acquired only in one spouse's name during the marriage, or acquired jointly.[170] Parties to a civil union would not be protected by this statute at the dissolution of their union as are spouses during a divorce because the Indiana Defense of Marriage Amendment bars the application of marital status or the legal incidents of marriage to an unmarried couple.[171]

The courts may also order one party in the divorce to provide maintenance support to his or her ex-spouse following a divorce.[172] The Indiana Defense of Marriage Amendment would have a profound impact on parties to a civil union being dissolved with regard to maintenance support. For example, consider John and Marsha who married two years ago during a vacation in Las Vegas. Their relationship is troubled, and the couple decides to divorce. Marsha seeks maintenance support under Indiana law, as she is undergoing chemotherapy for cancer and is unable to work due to the debilitating effects of the treatment.[173] Indiana statutory law would allow the court to require John to provide maintenance support to Marsha while she is unable to work. However, if Marsha

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164. *Id.* § 32-17-3-1.
165. *Id.*
166. *Id.*
167. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).
168. IND. CODE §§ 32-17-2-1, -3-1 (2004).
169. *Id.* § 31-15-7-4.
170. *Id.*
171. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).
172. IND. CODE §§ 31-15-7-1 (2004).
173. *Id.*

were Martin, he would be unable to obtain maintenance support from John at the dissolution of their civil union. The Indiana Defense of Marriage Amendment would bar the application of the maintenance support statute to their situation as an incident of marriage.[174]

For married couples with children, traditionally if one parent dies, custody of minor children goes to the surviving parent.[175] This right is based on the marital status of the parents.[176] The Indiana Defense of Marriage Amendment prohibits any Indiana law from being construed to confer marital status on an unmarried couple.[177] Thus, parties to a civil union could not be considered "married" per this amendment.[178] In contrast to the surviving spouse of a married couple with children, if one party to a civil union dies, then the survivor would not automatically have custody of any of the couple's children. Thus, in the event of the death of the biological parent, custody of the child could be awarded to a relative of the biological parent, or the child could become a ward of the state, despite the child having a living parent who is unable to obtain custody because he or she is of the same sex as the biological parent. To avoid losing custody of any children in the event of the death of the biological, the non-biological parent would have to adopt the child. Current Indiana law permits the non-biological parent to adopt their partner's child.[179] However, even this law might be declared unconstitutional under the Indiana Defense of Marriage Amendment, because by allowing the same-sex partner of the biological parent to adopt the child, it is construing the couple's relationship as having a marriage-like status, which is barred by the amendment.[180]

5. Summary of Effect of Proposed Amendment on Indiana Law.—Opponents of the proposed Indiana amendment fear that it will eliminate domestic partner health benefits offered by some Indiana employers, prevent application of domestic violence statutes to unmarried couples, and bar domestic partners from making medical decisions for an incapacitated partner.[181] The proposed amendment should not bar the voluntary offering of domestic partner benefits by universities and other public employers because there is no statute requiring public employers to offer health benefits to their employees' domestic partners. Application of domestic violence statutes could be declared unconstitutional should the proposed amendment be enacted.[182] However, this will depend on

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174. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

175. Brown v. Beachler, 68 N.E.2d 915, 916 (Ind. 1946) ("Of course parents if not divorced have the natural right to the custody of their children, and in case either parent dies this right goes to the survivor.").

176. *Id.*

177. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

178. *Id.*

179. *In re* Adoption of K.S.P, 804 N.E.2d 1253, 1260 (Ind. Ct. App. 2004).

180. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

181. *See* Ritchie, *supra* note 118; Ruthhart, *Round 2*, *supra* note 76; Ruthhart, *Committee*, *supra* note 86.

182. IND. CODE § 35-42-2-1.3 (Supp. 2006).

whether Indiana courts view the protection offered by the statute as an incident of marriage or as conferring a quasi-marital status, as did some of the Ohio appellate courts.[183] Same-sex couples can easily maintain the ability to make decisions for an incapacitated partner by designating each other as health care representatives under Indiana statutory law.[184]

A significant effect of passage of the amendment would be the pre-emption of future enactment of civil union legislation. The amendment bars the conferring of marital status or the legal incidents of marriage to unmarried couples.[185] Passage of the amendment would also prevent Indiana courts from declaring the current DOMA as unconstitutional and requiring Indiana to recognize or grant civil unions.[186]

III. WHY HAVE A DEFENSE OF MARRIAGE AMENDMENT?

With Indiana already having a DOMA that has withstood constitutional challenge, one wonders why an amendment to the Indiana Constitution is needed.[187] Proponents of the amendment claim that it is needed to prevent Indiana courts from declaring the Indiana DOMA unconstitutional and allowing same-sex couples to wed.[188] Additionally, in the words of its author, State Senator Brandt Hershman, the amendment "is an effort to preserve existing law, religious tradition and thousands of years of history from a carefully orchestrated attack by liberal special interests."[189] Thus, the reasons for enacting such an amendment are two-fold, much like the amendment itself, and each needs to be analyzed separately.

A. Protection of DOMA

Proponents of the Defense of Marriage Amendment maintain that the amendment is "essential to prevent activist judges from redefining marriage."[190] The amendment's author, Senator Hershman said "'[i]f interest groups are successful in their court challenge in Indiana as they have been in Massachusetts, an amendment to the Indiana Constitution will be the only means available to

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183. State v. Logsdon, No. 13-05-29, 2006 WL 1585447, at *6 (Ohio Ct. App. June 12, 2006), *rev'd sub nom. In re* Ohio Domestic-Violence Statute Cases, 872 N.E.2d 1212 (Ohio 2007); State v. Steineman, No. 2005-CA-46, 2006 WL 925166, at *1 (Ohio Ct. App. Apr. 7, 2006); State v. Ward, 849 N.E.2d 1076, 1077 (Ohio Ct. App. 2006), *rev'd sub nom. In re* Ohio Domestic-Violence Statute Cases, 872 N.E.2d 1212 (Ohio 2007).

184. IND. CODE § 16-36-1-7 (2004).

185. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

186. IND. CODE § 31-11-1-1 (2004); S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

187. IND. CODE § 31-11-1-1 (2004); Morrison v. Sadler, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005).

188. *See* Ruthhart, *Round 2*, *supra* note 76; Hershman Press Release, *supra* note 7.

189. Hershman Press Release, *supra* note 7.

190. *See* Ruthhart, *Committee*, *supra* note 86.

protect traditional marriage.'"[191] At the time that Senator Hershman made the above statement, a legal challenge was underway to the Indiana DOMA.[192] The special interest group that Senator Hershman referred to consists of three same-sex Indiana couples who challenged the Indiana DOMA after obtaining civil unions in Vermont.[193] These couples were "attacking" traditional marriage by asking that their civil unions be recognized as marriages in Indiana, thus seeking the benefits and responsibilities accorded to married heterosexual couples.[194]

The couples challenged the constitutionality of the DOMA with regard to three provisions of the Indiana Constitution: sections 1, 12, and 23 of article I.[195] The Indiana Court of Appeals held that the DOMA did not violate the Indiana Constitution.[196] Lower courts are bound to follow this ruling under the doctrine of stare decisis which has long been followed in Indiana.[197]

In *Collins v. Day*,[198] the Supreme Court of Indiana established a two part test for determining whether a statute is at odds with article I, section 23 of the Indiana Constitution.[199] The first part of the test provides that

> where the legislature singles out one person or class of persons to receive a privilege or immunity not equally provided to others, such classification must be based upon distinctive, inherent characteristics which rationally distinguish the unequally treated class, and the disparate treatment accorded by the legislation must be reasonably related to such distinguishing characteristics.[200]

The second part of the test requires that the "preferential treatment must be uniformly applicable and equally available to all persons similarly situated."[201] Courts must employ substantial deference to the legislature in considering the challenge, and the statute is presumed to be constitutional.[202] The burden is on the challenger "to overcome the presumption of constitutionality and to establish a constitutional violation."[203]

The *Collins* test established a difficult barrier for the challengers to overcome. The challengers had to go beyond showing that same-sex marriage would not directly harm traditional marriage; per the *Morrison* court, the challengers had to show that allowance of same-sex marriage would promote the

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191. Hershman Press Release, *supra* note 7.
192. *Morrison*, 821 N.E.2d at 15.
193. *Id.* at 19.
194. *Id.*
195. *Id.*
196. *Id.* at 33-35.
197. Cromie v. Bd. of Tr. of the Wabash & Erie Canal, 71 Ind. 208 (Ind. 1880).
198. Collins v. Day, 644 N.E.2d 72, 78-80 (Ind. 1994).
199. *Id.* at 78-80.
200. *Id.* at 78-79.
201. *Collins*, 644 N.E.2d at 79; *Morrison*, 821 N.E.2d at 21.
202. *Collins*, 644 N.E.2d at 80.
203. *Morrison*, 821 N.E.2d at 21.

state interests in heterosexual marriage, including procreation.[204] If the allowance of same-sex marriage does not promote these interests, "then limiting the institution of marriage to opposite-sex couples is rational and acceptable under [a]rticle I, [section] 23 of the Indiana Constitution."[205] This level of burden on the challengers to the constitutionality of the Indiana DOMA would make it extraordinarily difficult to overcome the presumption of constitutionality. It would be very unlikely under these rules for the statute to be declared unconstitutional. Indeed, as noted by the *Morrison* court, "[n]o statute or ordinance has ever been declared facially invalid under the *Collins* test."[206] The proposed amendment is not necessary to prevent the Indiana DOMA from being declared unconstitutional.

B. Protection of Traditional Marriage

How does allowing same-sex couples to marry or form a marriage equivalent civil union harm heterosexual marriage? One of the goals of the proposed Indiana Defense of Marriage Amendment, according to its author, State Senator Brad Hershman, is to protect traditional marriage.[207] Advocates of traditional marriage may have cause for concern as studies have shown that the marriage rate in the United States declined 50% since 1970, from "76.5 per 1000 unmarried women to 39.9."[208] However, connecting the decline of heterosexual marriage to same-sex marriage or civil unions appears to be very tenuous. Massachusetts is the only state allowing same-sex marriage, and it did not begin to do so until 2004.[209] Only three states allow civil unions for same-sex couples: Vermont began granting civil unions in 2000, Connecticut in 2005, and New Jersey in 2007.[210] Although marriage rates fell in the majority of states between 2000 and 2002, the rate of decrease in Vermont was less than the average of the other states with decreasing rates.[211] Marriage rates in the United States were in decline prior to the legalization of same-sex unions.

Although the legal recognition of same-sex unions is both a recent and localized development in the United States, several countries in western Europe

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204. *Id.* at 23.

205. *Id.*

206. *Id.* at 21.

207. Hershman Press Release, *supra* note 7.

208. Sharon Jayson, *Divorce Declining, but so Is Marriage*, USA TODAY, July 18, 2005, at 3A, *available at* 2005 WLNR 11229128.

209. Yvonne Abraham & Rick Klein, *Free to Marry; Historic Date Arrives for Same-Sex Couples in Massachusetts*, BOSTON GLOBE, May 17, 2004, at A1, *available at* 2004WLNR 3562416.

210. MARKOWITZ, *supra* note 122.

211. U.S. CENTER FOR DISEASE CONTROL, MARRIAGE AND DIVORCE RATES BY STATE: 1990, 1995, AND 1999-2002, http://www.cdc.gov/nchs/data/nvss/mar&div.pdf (last visited Jan. 14, 2007). Vermont had a decrease of 0.3 marriages per 1000 population between 2000 and 2002 versus an average decrease of 0.56 for the other thirty-seven states (excluding Nevada). *Id.*

have legally recognized same-sex unions for several years. One can look to these countries to determine if allowance of same-sex marriage really harms traditional opposite-sex marriage. Denmark enacted a registered partnership law in 1989 granting same-sex couples most of the rights and responsibilities of marriage.[212] Norway adopted a similar law in 1993, Sweden in 1994, and Iceland in 1996.[213] The Netherlands granted marriage to same-sex couples in 1998.[214] Since the granting of these rights to same-sex couples, the divorce rates have not risen and the marriage rates have remained stable or increased in these countries.[215] The experience in these countries has shown that granting same-sex couples a marriage like legalized partnership has not had a negative impact on heterosexual marriage.[216]

From a legal standpoint, the various litigated cases seeking recognition of same-sex marriage convey the state's (or states') interest in preserving marriage as procreation[217] and providing the best environment for rearing children.[218]

1. Procreation.—Procreation is viewed by some as the natural result of marriage.[219] "[M]arriage exists as a protected legal institution primarily because of societal values associated with the propagation of the human race."[220] "This is true even though married couples are not required to become parents."[221] The *Morrison* court noted that the state "may legitimately create the institution of opposite-sex marriage, and all the benefits accruing to it, in order to encourage male-female couples to procreate within the legitimacy and stability of a state-sanctioned relationship and to discourage unplanned, out-of-wedlock births resulting from 'casual' intercourse."[222]

However, many marriages are childless; U.S. Census data for 2005 indicates that approximately 21% of married couples between fifteen and forty-four do not have children.[223] The ability to procreate is not a requirement for marriage in

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212. M. V. LEE BADGETT, WILL PROVIDING MARRIAGE RIGHTS TO SAME-SEX COUPLES UNDERMINE HETEROSEXUAL MARRIAGE? EVIDENCE FROM SCANDINAVIA AND THE NETHERLANDS (2004), http://www.iglss.org/media/files/briefing.pdf.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. Dean v. District of Columbia, 653 A.2d 307, 333 (D.C. 1995); Adams v. Howerton, 673 F.2d 1036, 1125 (9th Cir. 1982); Baehr v. Lewin, 852 P.2d 44, 49 (Haw. 1993); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974).

218. *Baker*, 191 N.W.2d at 186; *Singer*, 522 P.2d at 1195-97.

219. Duncan, *supra* note 13, at 661.

220. *Singer*, 522 P.2d at 1195.

221. *Id.*

222. Morrison v. Sadler, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005).

223. U.S. Census Bureau, *Family Households, by Type, Age of Own Children, Educational Attainment, and Race and Hispanic Origin of Householders Under 45 Years of Age: 2005*, http://www.census.gov/population/socdemo/hh-fam/cps2005/tabF3-all.csv [hereinafter U.S. Census Bureau] (last visited Feb. 4, 2007).

Indiana.[224] Yet, same-sex couples are denied marriages because of their inability to procreate.[225] Judge Friedlander, in his concurring opinion in *Morrison* noted that in utilizing the *Collins* analysis,

> disparate treatment between classes is permissible so long as the treatment is reasonably related to the inherent characteristic that distinguishes the unequally treated classes . . . . [T]hat means the prohibition against same-sex marriage is justifiable because the purpose of the DOMA legislation is to encourage responsible procreation, and same-sex couples cannot procreate through sexual intercourse.[226]

Judge Friedlander went on to note that based on this rationale, the state could prohibit opposite-sex couples that were unable to have children due to either fertility problems or age from marrying.[227] Judge Friedlander continued that the Indiana DOMA's "narrow focus is to prohibit marriage among only one subset of consenting adults that is incapable of conceiving in the traditional manner—same-sex couples. Such laser-like aim suggests to me that the real motivation behind [the Act] might be discriminatory."[228]

2. Rearing Children.—Opponents of same-sex marriage argue that children will be harmed by the granting of marriage rights to homosexual couples.[229] These opponents argue that children do best when raised by heterosexual married couples and that they are "healthier both emotionally and physically, even thirty years later, than those not so blessed by traditional parents."[230] However, this contention is contradicted by other research.

A recent article in *Pediatrics*, stated that "[m]ore than [twenty-five] years of research have documented that there is no relationship between parents' sexual orientation and any measure of a child's emotional, psychosocial, and behavioral adjustment."[231] Research has revealed no disparity in adolescents' psychosocial adjustment between children raised by same-sex couples and children raised by opposite-sex couples.[232] Studies conducted with the children of lesbian mothers found that the children did not differ from other children with regard to

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224. IND. CODE § 31-11-1-5 (2004).

225. *Singer*, 522 P.2d at 1195. "Thus the refusal of the state to authorize same-sex marriage results from such impossibility of reproduction rather than from an invidious discrimination 'on account of sex.'" *Id.*

226. *Morrison*, 821 N.E.2d at 36 (Friedlander, J., concurring).

227. *Id.*

228. *Id.* at 37.

229. James C. Dobson, *Eleven Arguments Against Same-Sex Marriage*, May 23, 2004, http://www.citizenlink.org/FOSI/marriage/A000004753.cfm.

230. *Id.*

231. James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-Being of Children*, 118 PEDIATRICS 349, 361 (2006), *available at* http://www.pediatrics.org/cgi/content/full/118/1/349.

232. Jennifer L. Wainright et al., *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents with Same-Sex Parents*, 75 CHILD DEV. 1886, 1892 (2004).

emotional and behavioral adjustment, cognitive functions, and did not suffer negative psychological consequences due to being raised by a same-sex couple.[233]

Although same-sex couples only comprise about 1% of households in the United States, approximately 25% of these couples are raising children, which equates to at least 148,000 children.[234] Based on the research, denying these children and their parents the protections afforded to married heterosexual couples and their families based on opinions that children are best reared by traditionally married couples seems groundless. Indeed, it would be in the state's (or states') interest to provide children a suitable environment for development by allowing same-sex couples to marry or at least engage in civil unions with all the legal benefits and protections of marriage.

CONCLUSION

The stated goals of the proposed Indiana Defense of Marriage Amendment is to prevent courts from ruling the Indiana DOMA unconstitutional and to protect traditional marriage.[235] Senator Hershman asserts that the amendment "'is an effort to preserve existing law, religious traditions and thousands of years of history from a carefully orchestrated attack by liberal special interests.'"[236] The implication is that the proponents of gay marriage seek to destroy the institution of marriage and that this is being done by advocating for the legal right to partake in that institution.

Opponents of gay marriage maintain that allowing same-sex couples to marry will harm traditional marriage.[237] It is difficult to imagine how legally recognizing the union of a same-sex couple would harm anyone's marriage. Although there is insufficient data from the United States regarding what, if any, effect civil unions have had on marriage, several countries in western Europe have legally recognized same-sex unions for a number of years.[238] The experience in these countries has shown that legal recognition of same-sex unions has not had a negative impact on heterosexual marriage.[239] There does not appear to be any evidence that civil unions or same-sex marriage will in any way harm heterosexual marriages.

States litigating on the side in opposition to same-sex unions have sought to reserve marriage for heterosexual couples by virtue of the state's interest in propagation of the human race and providing the best environment for

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233. Norman Anderssen et al., *Outcomes for Children with Lesbian or Gay Parents. A Review of Studies from 1978 to 2000*, 43 SCANDINAVIAN J. PSYCHOL. 335, 349 (2002); Susan Golombok et al., *Children with Lesbian Parents: A Community Study*, 39 DEV. PSYCHOL. 20, 30 (2003).

234. Pawelski et al, *supra* note 231, at 361; U.S. Census Bureau, *supra* note 223.

235. Hershman Press Release, *supra* note 7.

236. *Id.*

237. *See* Ruthhart, *Round 2*, *supra* note 76.

238. BADGETT, *supra* note 212 (recognizing same-sex unions in Denmark since 1986, Norway since 1993, Sweden since 1994, Iceland since 1996, and the Netherlands since 1998).

239. *Id.*

children.[240] However, Indiana does not restrict marriage to opposite-sex couples of childbearing age.[241] Additionally, studies have shown that sexual orientation of a child's parents has no negative impact on the child's development into a healthy adult.[242] In fact, by not allowing their same-sex parents to legalize their unions, the families of thousands of children are being deprived of legal protection afforded to families with opposite-sex married parents. Is it truly in the best interest of families to deny these children those legal protections simply because their parents are not of opposite genders?

Opponents of the proposed Indiana constitutional amendment fear the impact the amendment could have on domestic partner benefits from public employers and application of the domestic violence statute to unmarried couples.[243] It appears that domestic partner benefits offered by universities and public employers would be unaffected by the amendment, as they are not mandated by statute, but are rather voluntarily offered by the employer. The Indiana domestic violence statute could be affected by the amendment depending on whether the courts perceive the statute as conferring a marriage-like status or incidents of marriage to an unmarried couple.

The overall affect of the amendment on current Indiana law would be minimal; same-sex marriage is already statutorily prohibited in Indiana by DOMA.[244] This statute has already withstood constitutional challenge.[245] The analysis method dictated by the Indiana Supreme Court creates a presumption that legislation is constitutional and requires the challenger to overcome this presumption.[246] As noted by the *Morrison* court, "[n]o statute or ordinance has ever been declared facially invalid under the *Collins* test."[247] Thus, the amendment is not needed to protect the Indiana DOMA.

If the amendment is not needed to protect the Indiana DOMA nor the institution of traditional marriage, what then will the amendment do? The most significant aspect to the proposed amendment is that it is a preemptive strike against the allowance of civil unions in Indiana. The language of the amendment would render any civil union statute that seeks to give same-sex couples the same rights and benefits as a married couple unconstitutional.[248] There appears to be no reason for denying same-sex couples the same rights as granted to married opposite-sex couples, except that gays and lesbians comprise a socially unpopular

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240. Dean v. District of Columbia, 653 A.2d 307, 333 (D.C. 1995); Adams v. Howerton, 673 F.2d 1036, 1125 (9th Cir. 1982); Baehr v. Lewin, 852 P.2d 44, 49 (Haw. 1993); Baker v. Nelson, 191 N.W.2d 185, 186 (Minn. 1971); Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974).

241. IND. CODE § 31-11-1-5 (2004).

242. Anderssen et al., *supra* note 233, at 349; Golombok et al., *supra* note 233, at 30; Pawelski et al., *supra* note 231, at 361; Wainright et al., *supra* note 232, at 1892.

243. *See* Ruthhart, *Round 2*, *supra* note 76.

244. IND. CODE § 31-11-1-1 (2004).

245. Morrison v. Sadler, 821 N.E.2d 15, 35 (Ind. Ct. App. 2005).

246. *Id.* at 21.

247. *Id.* at 22.

248. S.J. Res. 7, 114th Gen. Assem., 1st Reg. Sess. (Ind. 2005).

minority.

Eventually, Indiana, along with the rest of the United States, will grant legal status to same-sex couples either in the form of civil unions or marriage. Polls show that support for civil unions has grown from 45% in 2003 to 54% in 2006.[249] Additionally, 53% of Americans between eighteen to twenty-nine support gay marriage.[250] The question then will be whether the people of Indiana can look at their constitutional history without shame.

249. THE PEW RESEARCH CENTER, *supra* note 136.

250. *Id.*